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ABSTRACT

This section of the proceedings is comprised of 11 papers dealing with the relationship between media and the law. Papers include: "Equal before the Law: Three Media Myths of the American Legal System" (Henry Itkin); "The Role of Senator Albert Gore, Jr. in Satellite/Cable Legislation" (Michael B. Doyle); "The Law of Quotation Marks: Masson v. New Yorker Magazine, et al., 1989" (David Eshelman); "Conceptual Problems of Broadcast Indecency Policy and Application" (Jeremy Harris Lipschultz); "Invasion of Privacy: A Q-Study of the Orientations of Media, Officials and the Public" (Jeremy Harris Lipschultz); "Toward a Definition and Standard Method of Analysis for Libel by Implication" (Karen Markin); "Press Rolls Over, Plays Dead in New Assaults on First Amendment Protections" (Helen Niemiec); "Retraction: Analysis and Comments" (Louise Williams Hermanson); "The Misleading Search for Content Neutrality in Libel Law" (Ruth Walden and Hosoon Chang); "The Development of the 'Commercial Speech Doctrine' in the U.S. Supreme Court: Bright Line or Muddy Waters?" (Roy L. Moore); and "The Fairness Doctrine, the Citizens and the Radical Right-Wing: 'In re the Application of KAYE Broadcasters, Inc.'" (Timothy W. Gleason). (RS)

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Equal Before the Law:
Three Media Myths
# of the American Legal System

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Equal Before the Law:
Three Media Myths
# of the American Legal System

ABSTRACT

The American political system posits its existence on the idea that the legal order codifies society's central values. The integrity of the legal order is likewise based on two other assumptions: 1) that the police (and other officers of the legal system) act according to prescribed rules of conduct, and 2) that justice is meted out in an impartial and consequently unerring fashion.

These three precepts are labeled, respectively, the "consensus," "normative," and "computer" myths.

If, as some critical legal scholars assert, society is imbued with these myths, we would expect them to appear in the media coverage of the legal system.

This paper examines the text of television and newspaper coverage of a recent chapter in a highly visible criminal case and finds that the three myths emerge from both media with striking regularity--a phenomenon critical theorists would see as both a partial consequence of--and an influence upon--societal power relations.

Introduction

> Is it altogether a Utopian dream, that once
> in history a ruling class might be willing to
> make the great surrender, and permit social
> change to come about without hatred, turmoil,
> and waste of human life?
> --Upton Sinclair

The American political system posits its existence on the idea that the government, in order to maintain the peace, must codify and enforce certain of society's central values. In so doing it must "ensure democratic control over the state, equality before the law, and the protection of essential minority interests."[1] Clearly, the legal order frequently fails to meet these goals: Why, 35 years after Brown v. Board of Education,[2] does racial discrimination in education remain--much of it in the same "separate but equal" guise that the Supreme Court eschewed in Brown? And how can it be that 17 years after Congress brought universities within the compass of Title VII of the Civil Rights Act of 1964,[3] the plight of women in academe is only marginally improved? And why is it that the fairness and basic usefulness of our response to street crime has remained one of the nation's primary concerns when 21 years ago Congress passed the Omnibus

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[1] William Chambliss and Robert Seidman, Law, Order, and Power, 2nd ed., (Reading, Massachusetts: Addison-Wesley, 1982) 19.

[2] 347 U.S. 483 (1954).

[3] 42 U.S.C. Sec. 2000e (1964). The landmark 1964 act prohibited discrimination by employers based on race, color, sex, religion, or national origin. A 1972 amendment (P.L. 92-261) broadened the act to cover public employees.

Crime Control and Safe Streets Act[4] with the stated goal that "criminal justice efforts must be better coordinated, intensified,and made more effective and equitable at all levels of government"? These and many other pressing concerns suggest forcefully the importance of the study of law and society, for it is this area of inquiry that seeks to contend with problems such as these through the legal system.

That the news media are a "relentless presence...in the nation's livingrooms"[5] needs little explanation. Television, because it is a latecomer to the production and transmission of news and because of certain other of its unique characteristics--its visual nature, its fleeting quality, and its heavily commercial identity--has long been the object of study. But until the last decade, this work, drawing on models patterned after the physical sciences has dwelled primarily on presumed causal relationships between an individual's exposure to the media and his/her subsequent behavior.

The research initiated here takes a new avenue to examining the relationship between the American legal system and the news. A great deal of productive scholarship has been directed at how the legal system scrutinizes the news media, that is, through the laws of libel, privacy, airwave access, and the like: the media as viewed by the legal system. This article offers a reversal of this approach, that is, a view of the law through the eyes of the news media. The approach I have employed is suggested succinctly by the above quotation from Upton Sinclair, and it is enunciated more fully later. For the moment, though, I will restrict my explanation to the fact that this study bears only slignt resemblance to prior work[6] that attempts to criticize news coverage of crime through content analysis and a subsequent comparison of the results to "the real world." The material to be examined here is limited. For this reason, I consider the study to be a preliminary one. To locate itself on firm ground--or at least the firmest one could hope for amid the shifting sands of cultural studies--a much wider sampling would be required.

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[4] 42 U.S.C. Sec. 3701.

[5] Todd Gitlin, "Looking Through the Screen," Watching Television, ed. Gitlin (New York: Pantheon, 1986) 6.

I

In its coverage of the law, the news media tell certain stories about the legal system. These stories, in most cases lying beneath the manifest content of a newscast or print item, may be elicited by a critical reading of the news text. The theoretical issue in this research is the relationship between these stories and the power relations that govern the production of the news.

A crucial addition to the framework of this theory is provided by the "conflict" model of the legal order. From the traditional "functionalist" perspective, drawn largely from Durkheim,

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[6] For example, Doris Graber, Crime News and the Public (London, Beverly Hills: Sage, 1986).

> The law represents the value consensus of society. [It] represents those values and perspectives which are fundamental to social order...[and] which it is in the public interest to protect. The state as represented in the legal system is value-neutral...[7]

Functionalists argue "that a single murder may have less dire social consequences than the failure of the stock market, yet the former is a crime for the reasons stated [above] and the latter is not."[8] The focus of mainstream criminology "is on criminals and on preventing them from committing crime."[9] Further, according to the mainstream view, "Street criminals are not simply victims of circumstances, they are morally deficient."[10]

"Conflict" criminology attempts to improve upon the weaknesses of the mainstream view. For example,

> If the purpose of the laws against murder is to protect human life, how are we to explain the failure to treat industrial accidents--even those involving gross negligence--as criminal matters?[11]

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7. William J. Chambliss, "Functional and Conflict Theories of Crime: The Heritage of Emile Durkheim and Karl Marx," Whose Law, What Order?: A Conflict Approach to Criminology, ed. Chambliss and Milton Mankoff (New York: Wiley, 1976) 4.

8. Chambliss 4.

9. Stuart A. Scheingold, The Politics of Law and Order: Street Crime and Public Policy, (New York: Longman, 1984) 4.

10. Scheingold 12.

11. Scheingold 22-23.

The conflict paradigm is an outgrowth of Marxist thought, but its most refined variation goes beyond the Marxist view that social phenomena may in all cases be explained by economic realities: the underlying premise of conflict criminology is that differences between individuals produce differing respective likelihoods in attaining individual goals. Organization among like-minded individuals reinforces values shared within the group and distances the group from its competitors. From this perspective, crime may be seen as the "politicization of social conflict."[12] Not only economic "class," but race, sex, religion, and so on, cause social divisions. These divisions produce varying interests and value systems, and

> certain groups are particularly well placed to decide which patterns of behavior will be deemed legitimate and which will be deemed criminal.[13]

In summary, conflict criminology maintains that differences in the way we apply criminal laws may be traced to the way we construe certain harmful acts rather than in any intrinsic differences in the acts themselves.[14]

How the workings of the legal system are construed by the public is largely the province of the mass media. That news items on television, as well as in the newspaper and on radio, are referred to as "stories" is hardly a coincidence. Students of news content consistently have found a distinct narrative structure to newswriting. Park explains, for example, that the average person "thinks in concrete images, anecdotes, pictures, and parables," and comments that the "'news story and 'fiction story' are...now sometimes so like one another that it is difficult to distinguish them."[15] Manoff and Schudson refer to journalism as a "storytelling activity" and a "form of fiction."[16] The importance of this observation for our reading of the news is dramatic, for the news defines itself, as Fiske explains, as "tell[ing] the story of the key events of the past twenty-four hours." This definition highlights an important contradiction, for "events seem to be part of nature, whereas telling of stories and selection of the key events are clearly cultural activities."[17]

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[12] Scheingold 21-22.

[13] Scheingold 19.

[14] Scheingold 24.

The corporate nature of news organizations and the actual techniques of newspaper and TV production are commonly seen as having an impact on the meanings audiences may derive from their content. The possible meanings to be drawn from a given news item may be many, but news, like the rest of mass media content, may be viewed as a discourse, that is, as "a set of conventions

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15. Robert E. Park, "The Natural History of the Newspaper," Mass Communication, 2nd ed., Ed. Wilbur Schramm, (Urbana: University of Illinois Press, 1960) 18.

16. Robert Karl Manoff and Michael Schudson, "Reading the News," Reading the News, Ed. Manoff and Schudson, (New York: Pantheon, 1986) 6.

17. John Fiske, Television Culture (London: Methuen, 1987) 283.

that strive to control and limit the meanings of the events it conveys."[18] To accomplish this, the text "produces a socially located position that it invites the viewer to occupy in order to understand it easily and unproblematically."[19] If the reader/viewer obliges in this, s/he has accepted a so-called "preferred reading."

> Because television is institutional art with a strong economic motive, this preferred reading will normally bear the dominant ideology, and the relation of any one subculture's reading to the preferred reading reproduces the relation of that subculture to the dominant ideology.[20]

This paper will argue, then, that a decoding of some of the stories embedded in the news text yields a "preferred reading" that amounts to a series of parables of the "common sense" of the status quo. In other words, if current critical thought regarding how dominant ideas become and remain dominant are correct, news stories regarding the American legal system will emerge as a significant part of the machinery that influences the powerless to acquiesce to, or even participate in, their own domination by those in power.

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[18] Fiske 282.

[19] Fiske 25.

[20] Fiske 117.

II

Television news lures the viewer, with enormous seductive power, to see reality in art. Fiske, however, finds the idea that television is a sort of impersonal, non-cultural "glass" upon reality to be simply a ruse. He argues that the essence of television realism is not that of a reflected or mediated version of reality; it is instead simply a version of the dominant ideology--disguised to look like the seamless, natural, "common sense" world.

The print media likewise have a history of "common sense" conventions now accepted to such an extent that they have become embedded in everyday language. What is published in the newspaper, for example, is said to appear "in black and white;" that is, it is true and everyone knows it.

And yet, these are not statements of the impossibility of interpreting the meanings of the news, for if the reality of news publications and broadcasts is a constructed reality, then with the proper tools we should be able to deconstruct it, to break this

> complete meaningful harmony into its component parts in order to show that viewed from a different angle, these component parts form new relationships...In this new role, it will be precisely like a piece in a jigsaw puzzle whose

> meaning is revealed only through its relation to other pieces.[21]

Setting aside Leymore's ill-considered implication that a communication act may be interpreted with the ease of assembling a puzzle, we are left with a cogent analogy suggesting that the apparent meaning of a single portion of text may well be rendered marginal when the surrounding material, including the methods of production, are brought into consideration.

Critical theory takes as its basic assumption that the motor of social life is not consensual values but conflict, power, and inequality. Cultural content, as Johnson explains, cannot be understood without an understanding of power,[22] including, especially, the power of news reportage

> to shape and limit the way we understand the world. Journalism renders some views legitimate, others illegitimate, still others invisible. It draws boundaries around society's main political conversations.[23]

This research is guided by Richard Johnson's circular model of the production of cultural products[24], Joslyn's study of the meanings of elections as derived from political advertising texts[25], Scheingold's discussion of conflict criminology (above), and especially by Chambliss and Seidman's three myths of the legal system[26], a discussion of which accompanies the textual analysis below.

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[21] Varda Langholz Leymore, Hidden Myth: Structure and Symbolism in Advertising (New York: Basic Books, 1975) viii.

[22] Richard Johnson, "What Is Cultural Studies Anyway?" Social Text, Winter 1986/87, p. 39.

[23] Todd Gitlin, "The Greatest Story Never Told," American Government 1988/89 (Annual Editions Series), ed. Bruce Stinebrickner, (Guilford, Connecticut: The Duskin Group, 1988) 209.

[24] Johnson 47.

To assess the usefulness of the theories discussed thus far, I selected for study the Seattle local news coverage of a 1986 incident involving a man who police thought might have been the infamous Green River killer, responsible for the deaths of at least 34 young women during the first half of this decade. The background of the incident is as follows: On February 6, 1986, members of the Green River Task Force stopped one Ernest William "Bill" McLean near his place of employment and questioned him about the killings. His Seattle-area home was cordoned off and subjected to an intensive search; his wife was also questioned. The flurry of police activity at the McLean home and at the headquarters of the Green River Task Force provoked what KIRO television reporter Hilda Bryant called "a state of near-hysteria." Both McLeans were allowed to leave after questioning, "but not before Mrs. McLean had surrendered head and pubic hair and saliva samples." Bill McLean later described the experience, referring in part to the media coverage, as "like a sick nightmare."[27]

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[25] Richard Joslyn, "Political Advertising and the Meaning of Elections," New Perspectives on Political Advertising, ed. Lynda Lee Kaid, Dan Nimmo, and Keith R. Sanders (Carbondale: Southern Illinois University Press, 1986) 139-183.

[26] Chambliss and Seidman 7.

The incident was selected because, due to the unexpected breaking of the story, any effects of the conventions of news production (for example, the twin necessities of working on a deadline and beating the competition) would very likely be magnified. The first text analyzed here comprises two studio reports by KIRO television reporter Hilda Bryant. The pieces appeared on the station's 5 p.m. newscasts of February 6 and February 7, 1986, respectively.[28] Bryant's reports were chosen for their technically straightforward approach. Visual material in the reports (except for the on-screen image of Bryant herself) is minimal. Discussion of the power of television visuals has been left for future study. In addition, I have examined all of the coverage of the event by Seattle's two daily newspapers, the Post-Intelligencer and the Seattle Times, a total of fifteen articles.

III

Chambliss and Seidman's three "myths" of the legal system begin with the consensus myth, which holds that the law is a codification of society's value consensus, that there is, in other words, "no gap between the law and every sound citizen's ideology." The normative myth argues that officers of the legal system--lawyers, judges, sheriffs, social workers, and others, act in accordance with their roles as prescribed by law. Finally, the computer myth asserts that, like an "electronic brain," the legal system digests the facts of each "case," applies the law, and produces "correct" decisions. "In the computer myth, discretion, bias, power, and corruption do not exist or constitute at most temporary aberrations."[29] Fiske summarizes the myths' application to the news:

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[27] Bill Curry, "Green River Killer Case: TV 'Near-Hysteria' Scars 'Suspect' and News Media," Los Angeles Times, 17 April, 1986: 30, 32.

[28] Direct references to the reports, transcripts of which appear in the appendix, are designated in the text by sentence number and appear in bold type.

> What is absent from the text of the news, but present as a powerful force in its reading, are the unspoken assumptions that life is ordinarily smooth-running, rule- and law-abiding, and harmonious. These norms are of course prescriptive rather than descriptive, that is, they embody the sense of what our social life ought to be rather than what it is, and in doing this, they embody the ideology of the dominant classes.[30]

This analysis shows the three myths to emerge from both television and newspaper reports with striking regularity.

The KIRO report opens with the program's anchor, Susan Hutchison, commenting that "of course" the police will say little publicly about the recent events**(1)**. The remark strongly evokes the normative myth, saying in effect that the police are doing their job as prescribed by law: they are not supposed to talk;

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29. Chambliss and Seidman 7.

30. Fiske 284.

they are not talking. Hutchison then reminds viewers that despite this obstacle, the station's investigators have found some sources who would talk. The deceptiveness of this introduction is revealed shortly thereafter(3) when we learn that the sources referred to ostensibly include police officials. Hutchison's introduction also sets the tone for the report by stating that McLean is a "suspect." (An on-screen graphic also so labeled him.) This became a serious issue during the questioning and its reporting, for while police insisted that McLean was merely a "person of interest," that he was not a suspect nor was he under arrest, television reports frequently (though not always) referred to him as a suspect.[31]

Bryant begins her portion of the report with a long list of McLean's alleged crimes--allegations which, for the first 65 words of the report, are attributed only to "they." "They believe this is their man," she proclaims.(2) The viewer is here positioned to read the motto, "They always get their man," the aspect of the computer myth in which the system operates dispassionately and without error. We also learn in this, Bryant's first sentence on the air, that "they think...their evidence does link the man they're questioning to most of the Green River mur-

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31. "Man 'Linked' to Murder Wins $30,000 From Media," Seattle Times 3 Aug. 1989: B5. McLean filed suit against KIRO and KING television and against the Post-Intelligencer for defamation and invasion of privacy and in mid-1989 settled out of court for the relatively minor sum of $30,000.
The matter of whether McLean was, in fact, a "suspect" under "arrest" is discussed below in relation to newspaper coverage.

ders." Once again here, the normative myth is in full force. The police submitted a 32-page affidavit for a warrant to search McLean's home,[32] and yet, considering the outcome of the incident, "evidence" seems far too strong a word. The implication of the narrative, however, is clear enough: this is a story about how the police dutifully go about their business in strict accordance with the rules.

The computer myth immediately arises again as Bryant explains that McLean "does not especially resemble the artists' composites of the men that the police have been seeking."**(8)** The police, it is implied, must be terribly smart in order to have nabbed Mr. McLean after having been misled about his appearance. Missing are any suggestion of 1) the artists' having been part of the task force and 2) the alternate interpretation that the reason McLean didn't look like the drawings was that he was not the guilty party. As we have noted above with Gitlin, alternate readings are rendered invisible. All the possibilities appear to have been accounted for. By the end of the sentence, the text has returned again to the normative myth: despite McLean's lack of resemblance to the drawings, "his outdoor lifestyle does match."**(8)** The task force is following the trail of evidence. What it has learned, and what KIRO and the viewer learn from the next segment--a taped interview with Jack Scott, one of McLean's neighbors--, is that the "person of interest" is a hunter and a

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32. Curry 31.

fisherman by avocation.**(9-13)** The interview, which at first greatly enhances the impression that the police have rounded up a man capable of killing, is continued later in the report when Scott reports having had no trouble whatsoever with McLean, calling him "a very good neighbor."**(19)** But this second portion of the interview is surrounded by contrary suggestion. First, Bryant states with sarcastic inflection that McLean's neighbors "are surprised by the police activity,"**(18)** as if to say, "Boy, are they dumb to argue with the 'computer.'" Near the end of the interview, Bryant (or her producer) allowed to go unedited Scott's reference to McLean as a "suspect."**(22)** What KIRO would undoubtedly refer to as an oversight, does, however, allow the station to imply what the police won't: They have the man; the "computer" works.

The "sources" upon which Bryant bases her report tell her also that McLean "has been known to mutilate dogs that wandered into the traps he'd set for wild game."**(15)** Here again, we can hear the computer whirring in the background, digesting the "facts" of the case, but the normative myth is even more prominent, for not only do we envision the police putting together a case, but they are once again dealing with a "suspect," according to Bryant.

At the conclusion of the first report are two more exceptionally clear uses of the normative myth. In a comment about the hard work expended by the police, Bryant notes that "the inquiry about the man has been going on for several months."**(24)**

Why, then, hasn't anything turned up? "Police say they've been proceeding very slowly because they _want_ to be _right_."(25) It is a truly breathtaking irony that the norm evoked here is of the deliberate and meticulous turning of the wheels of justice.

The consensus myth appears but once in the first report and in a form varying slightly from what Chambliss and Seidman describe. After Bryant's discussion of McLean's alleged proclivity for animal mutilation, she states, almost in an aside, that "while we have the man's name, we really aren't releasing it tonight."(17) The consensus referred to by this portion of the report is an ethical, rather than a legal, one. News stations are expected to refrain from disclosing names in potentially damaging or severely embarrassing situations when the party involved has not been arrested or charged. In what appears to be the statement of a highly civilized policy, Bryant actually locks the station into a moment of acute hypocrisy, for just minutes before, another KIRO reporter announced McLean's name in his report.

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The second of Hilda Bryant's reports was aired 24 hours after the first. Much had transpired: McLean had been released after 10 to 12 hours of questioning, and, as The _Los Angeles Times_ reported, "there was no overt indication that the police had ever had their man."[33] Still, Bryant's second report followed closely the outline of the first and, in fact, contained exactly the same interview segments with Jack Scott and some of the same scripted comments by Bryant herself. The remainder of this analysis will, therefore, focus on where the second report was altered from the first and what meanings can be derived from the changes or lack thereof. The body of the second report is followed by an apparently ad libbed conversation between Bryant and anchor Susan Hutchison, which I also examine.

Bryant's opening comments in the second report change the attitude attributed to the police from the idea of *belief* to that of *faded hope*.(26) Beyond this, her description of police activity is similar to the first report. The theme introduced here and carried throughout the segment is of the immenseness, the indestructibility of institutions under attack: McLean has been released (though Bryant never specifically mentions this), the police have made what appeared even at the time to be several major errors in judgment, the killer of dozens of young women remains at large, and yet the news conveys a comforting sameness from the previous evening when for a moment all was thought to be well.

If the normative myth of the police acting as police are supposed to act was clearly evident in Bryant's first report, it is pervasive here. Added to the opening are three new sentences specifically justifying police actions. Bryant allows that "tonight the man looks less and less like a suspect"**(28)** (though police had been quite emphatic in their insistence that the man never was a "suspect"). Whatever small force this might lend to any anti-police or pro-McLean feeling in the report is lessened when the apparent back-tracking is introduced by a reference to the police filing of a "25-page list of reasons" for their need to search McLean's house.**(27)** Adding further weight to the normative myth here is that police administered a polygraph test to McLean.**(29)** Implied is that the computer (literally this time) proclaimed the man's innocence and that the police were all too happy to comply with this finding. In fact (though Bryant fails to say so), McLean passed the lie detector test four times over a period of five to six hours before police began to get the message.

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[33] Curry 30.

The report's next portion, as with its earlier counterpart, lists several of McLean's physical and social qualities that apparently brought him to the attention of the task force. Here, McLean's age is changed from 45 to 52, but apparently the earlier error may be excused, for "even with a full beard he looks younger."**(30)** Crucial to the understanding of a preferred reading of this segment is the fact that despite McLean's having been released, great emphasis is still placed on the likelihood of his guilt. Instead of being described as a cement worker who hunts and fishes as a hobby, McLean now becomes "an outdoorsman, a woodsman, a hunter, and a professional trapper. He's also a cement finisher..."**(31,32)** The vocal emphasis given to "professional" may connote his ability to make money at the trade, thus justifying the secondary position given his construction work in the script, or it may be read as a measure of his superior ability as a trapper, in defense of anyone (police, KIRO, Bryant) who thought him a suspicious character.

The second report has McLean performing construction work on "20 different locations"**(32)** rather than having held "20 different jobs"**(6)** in the past three years, but once again, this is not the retraction it seems but only a wording change that allows a logical transition into the idea (new in the second report) that many of the job locations were "in areas where Green River victims were found."**(32)**

The end of this portion of the second report provides an interesting look at the conventions of television reporting. "Talking heads" (lengthy interviews or studio shots) are thought to be unexciting for the viewer, making frequent visual changes a standard prescription. Bryant's nod to this convention in the first report is the interview with neighbor Jack Scott, who corroborates (or perhaps was the original source of) Bryant's report of McLean's penchant for outdoor hobbies. Now, however, the situation has changed: McLean has been portrayed as a professional trapper, and this material has been moved up in the sequence of the report. Just the same, the interview with Scott appears again, and with the same lead-in--now both inaccurate and repetitious. The example suggests strongly that Fiske's idea that both the corporate nature of the television business _and_ the conventions of its production (though these cannot be entirely separated) contribute heavily to the content of the stories the medium tells.

Following the Scott interview, Bryant continues her report by listing several other items that _had_ cast suspicion on Bill McLean (though the idea that suspicion continues can simply not be denied): now he not only _worked_ in the vicinity where several victims were found, but "He lives near where several were found."**(41)** (A graphic showing the proximity of McLean's home to the location of the bodies of four victims had been displayed earlier in the program.) As a lead-in to the second interview segment, Bryant repeats the rumor about animal mutilation but with significant wording changes: "And the police are curious about his reputation for mutilating dogs..."**(42)** The police are newly included in this sentence, legitimizing what was apparently nothing more than rumor; and a present tense verb ("_are_ curious") is used denoting continuing suspicion. (The use of present tense is also a television news convention intended to highlight the "immediacy" that the medium claims as one of its strengths.) Following this is the identical second interview clip with Scott explaining that McLean has been an exemplary neighbor.

The conclusion of the scripted portion of Bryant's second report includes only a single change from the original version: we are again told that the police have been investigating McLean for months, but the deliberate pace of the inquiry is now explained with the phrase "because they didn't want to make any mistakes."**(51)** The (perhaps casual) choice of words leads to the obvious question from anchor Hutchison: "But have they made a mistake?"**(52)**

The question has direct application to all three of our myths. We might reconstruct it as Have the police acted "by the book"? (Normative) Did the system operate without bias or prejudice? (Computer) and Does the legal order constitute a reflection of society's values? (Consensus) Bryant speaks for the system: no mistake has been made. Assuming that Bryant knew intellectually (if not viscerally) that McLean was not the Green River killer, then her response can only be interpreted as answering the questions I have outlined above. Her remarkably candid explanation confirms this:

> [Y]ou have to go through this process. You can't walk into a man's house and search it or grab his car. You have to have search warrants. To get search warrants you have to have a very believable list of reasons that he might be a potential suspect. It's difficult for the police. What are they supposed to do? They don't know whether the man is going to be dangerous or not...I really think the police did what they felt was right and didn't make any mistakes. **(53-61)**

In a few short sentences, Bryant has encapsulated all three myths under discussion here: the police have followed procedure, the court has in its value-free tradition processed the affidavit that produced a search warrant, and society has agreed that the police should conduct such investigations.

To conclude the report, Hutchison offers up another pointed question: "What's next for this man?"**(67)** Bryant responds in what is now a predictable fashion and is also a definitive illustration of the consensus myth:

> I suppose he's going to be embarrassed for a little while. But his friends and neighbors have stood loyally by him, and I don't think it's hurt his reputation.(68,69)

A preferred reading of this comment might be rendered as: "The law (and the media) must at times inflict this sort of hardship on a citizen in the course of their duties, but things will nevertheless end happily." The ruling institutions are said to be acting in the name of societal consensus.

* * *

While the KIRO television coverage of the McLean incident clearly implied that the police had gotten their man (though task force officials vehemently denied that anything important was going on), newspaper reports erred in the opposite direction: When task force spokeswoman Fae Brooks told reporters that McLean was not a suspect, was not under arrest, and was merely a "person of interest," both papers dutifully reported her comments, never suggesting the contrary.

The existence of the computer myth is forcefully validated here, through the Times' and the Post-Intelligencer's apparent willingness to grant that since the police had not made an arrest of a "suspect," no significant error had occurred when it transpired that McLean was unconnected to the murders. Legal definitions from most quarters, however, make this position untenable:

> The traditional definition of arrest is the deprivation of a person's liberty by legal authority. The logical conclusion arising from full acceptance of this definition would be that an arrest, and therefore a Fourth Amendment seizure, occurs whenever a person's liberty has been restricted to the extent that he is not free to leave of his own volition.[34]

And a "criminal arrest," according to The Guide to American Law, is the seizure and detention of a person suspected by law enforcement officials of committing a crime.[35] McLean, described variously as having been "hauled in," "picked up," "stopped,"[36] "[taken] into custody,"[37] and "detained,"[38] surely had his

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34. Encyclopedia of Crime and Justice, ed. Sanford H. Kadish, vol. 1, (New York: Free Press)71. The venerable Black's Law Dictionary concurs in this simplest of definitions. The Supreme Court decided in Terry v. Ohio, 392 U.S. 1 (1968), that although a pat-down search does slightly restrict a person's liberty, this type of stop is not an arrest and may be conducted with less than probable cause. The Court also noted that the seizure of a person that ends in a trip to the station house is the traditional definition of an arrest.

35. The Guide to American Law, vol. 1, (St. Paul: West Publishing Co., 1983) 320.

36. Duff Wilson, Michael A. Barber, and Steve Miletich, "Man Questioned About Green River Murders," Seattle Post-Intelligencer 7 Feb. 1986: A1.

37. Joni Balter, et al., ""Questioned Man Weighs Damage," Seattle Times 8 Feb. 1986: A1.

38. Joni Balter, "How Do You Measure Damage?" Seattle Times 10 Feb. 1986: A1.

liberty restricted. He was given a Miranda warning,[39] and was then transported to the task force headquarters for questioning[40] . There is little room for doubt, then, that an arrest took place-- regardless of what it was called and whether it was announced to McLean or the media. The question remaining, then, is whether McLean was, in fact, a suspect. The Green River Task Force emphatically said not, but again legal authorities would differ. Black's defines the verb to suspect as "to have a slight or even vague idea concerning;--not necessarily involving knowledge or belief or likelihood," and "suspicion" as "the apprehension of something without proof or upon slight evidence."[41] One anonymous task force official told a reporter that there was "an awful lot of good probable cause,"[42] a standard far above the legal definition of suspicion. But even without probable cause, it would be difficult to maintain that authorities did not have a "slight or even vague idea" that McLean was the guilty party.

Of the abundant examples of the computer myth in newspaper coverage of the incident, certainly the most obvious occurred nine days after the arrest and questioning when a "computer ex-

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39. Carlton Smith, Tomas Guillen, and Joni Balter, "Police 'Tried to Get Me To Break,'" Seattle Times 13 Feb. 1986: A12.

40. Carlton Smith, "Hill Plans Green River Case Review," Seattle Times 11 Feb. 1986: B2.

41. Henry Campbell Black, Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979) 1297-98. Emphasis added.

42. Wilson, Barber, and Miletich A1.

pert" asserted and the Post-Intelligencer headlined that it was the task force's computer, not a merely human decision, that led to the questioning of McLean. Investigators "had no choice" but to question McLean, the expert said, explaining that "once you've reduced the number to 15 suspects, for example, the computer won't reduce it to one. ...Then you have to do something else, like they did with McLean."[43] Left unsaid by the Post-Intelligencer and its expert source are 1) that the computer will reduce the number of suspects as far as its man-made program commands and 2) that none of the other 14 (hypothetical) suspects was ever arrested or questioned.

Differences between television and newspaper coverage surface once again in connection with the appearance of the normative myth. Here, though, rather than simply varying versions of the myth, occasional contradictions of it may be observed. While quoting Green River Task Force Commander Capt. Frank Adamson as saying that the force merely interviewed a man and then "went a little further and conducted a search" and that "outside forces" were giving credence to McLean's viability as a suspect, the Post-Intelligencer countered that "practically the whole 55-member task force was involved in [the] investigation;"[44] and the Times noted that the task force had made the "unusual move" of using "a recorded phone message to broadcast the fact that it was serving a search warrant on the man's residence."[45]

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[43] Steve Miletich, "Green River Computer Led to Questioning," Seattle Post-Intelligencer 15 Feb. 1986: A8.

[44] Duff Wilson and Michael A. Barber, "No Green River Breakthrough," Seattle Post-Intelligencer 8 Feb. 1986: A1,A4.

The newspapers, though, were not without specimens of the normative myth. The Post-Intelligencer reported, for example, that "where the task force erred, according to...law enforcement experts, was building expectations in the news media and elsewhere that the case was about to be solved."[46] This technique might be dubbed "praising with faint damnation," for the paper, in reporting prominently on a public relations miscue, has allowed ample room for the acceptance of the sources' assertion: that aside from slightly mishandling its P.R., the task force operated exactly as per procedure.

Finally, the consensus myth, which maintains that the legal system is a direct representation of the moral system of the people, stands in bold relief in both newspapers. The third morning after McLean's questioning, the Post-Intelligencer, in a story interestingly headlined "Green River False Alarm Handling Upsets Officials," actually reported that King County Executive Tim Hill had not "lost faith" in the task force and that no budget cuts were likely for the force. The issue, he said, was not whether a mistake was made: "We have to get our priorities

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45. Balter A1.

46. Miletich A8.

straight. We're out to catch a killer."[47] While a social consensus against murder does surely exist, there is much room for doubt about whether such a consensus extended to pressing an all-out hunt for the Green River killer when it had apparently been over two years since the killer was active and since, despite the expenditure of millions of dollars and thousands of police hours, the trail appeared to have grown quite cold.

The Post-Intelligencer's compliance in circulating the consensus myth arises, lastly, in its report on the task force computer (discussed above). Here, the computer expert, while declaring himself a "civil libertarian," nonetheless proclaims the investigation a textbook example of how society's interest must be balanced against "the risk of embarrassment to someone"[48] and, like Bryant and County Executive Hill, concludes that the people's will is that we must forego the luxury of sparing the suspect his reputation.

Conclusion

To Sinclair's plaintive question about whether the rulers of society might not one day decide to become humane citizens of the planet first and captains of industry second, Chambliss and Seidman offer a response:

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[47] "Green River False Alarm Handling Upsets Officials," Seattle Post-Intelligencer 9 Feb. 1986: A1. The Seattle Times 36 hours later published a similar story in which it quoted Hill as saying, "The bottom line is catching the criminal."

[48] Miletich A8.

> It does not work that way. ...those who have owned the world have run it and have kept in force legal orders to facilitate their continued ruling and privilege. They did this despite legal orders that on their faces aimed at equality and representative democracy.[49]

The evidence accumulated here endorses this view. By inquiring into the relationship between the legal order and the news, I have attempted to apply a theory that views societal relations as being governed primarily by economic and political power and guided by the principle of inequality. Based on this proposition, I have sought stories in the news that speak of the virtues of such a system. The framework of Chambliss and Seidman's three myths allows these stories to be read with relative ease.

Print and television news, it is clear, ought not be viewed as simple windows on the world. The interpretations offered here are, therefore, based on a polysemic view of the news. Just as an analysis of manifest content would not have taken us to our critical destination, so proclaiming a single "correct" reading of the news would be wholly inadequate, for both of these approaches assume the ability of the viewer to view objectively and the ability of the producer to see and record objectively. But, as Allen has written,

> Framing the discussion by these terms obscures the fact that there is no "unbiased"

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[49] Chambliss and Seidman 1.

> manner by which television (or any other system of representation) can show us the world.[50]

Instead, I have demonstrated how the "codes" of the news media, like the systems of language which brought forth this type of analysis, produce multiple meanings. The production phase of the creation of the text, does, however, yield a "preferred reading," one which the reader is positioned to read with ease and gratification. These readings, which have been the central focus of this work, tend to be stories of the glorification of the status quo, in this case the myths of the workings of the legal system. The stories told, then, are part of the machinery of hegemony,

> the process whereby the subordinate are led to consent to the system that subordinates them. This is achieved when they "consent" to view the social system and its everyday embodiments as "common sense"...[51]

Though the crucial contribution of the audience in both the production and reception of texts has been duly noted here, I have made little comment on what actually occurs in the mind of the viewer. Still, criticism of traditional work in this area should not viewed as gratuitous. Cognitive and affective viewer response are issues of great urgency, but this study and others suggest that the framing of questions in this area must bring the production and text phases to bear on audience response so that the interplay between these phases might be brought to light.

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[50] Robert C. Allen, introduction, Channels of Discourse: Television and Contemporary Criticism, ed. Allen (Chapel Hill: University of North Carolina Press, 1987) 5.

[51] Fiske 40.

As Gitlin reminds us, "[the media] report not 'how things are' but how power and convention say things are."[52] This research has attempted to articulate the nature of one portion of this precept.

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[52] Gitlin (1988) 213.

APPENDIX

Transcript of Hilda Bryant's Reports

(With Anchor Lead-Ins,

Taped Interview, and Studio Discussion)

KIRO Television, February 6-7, 1986

Hutchison (Anchor): **(1)**Of course, police publicly will say little about the suspect, but our reporters, including Hilda Bryant, have sources close to the Green River Task Force who are talking to us.

Bryant: **(2)**Well, Susan, they're telling us that they believe this is their man; that he's responsible for the majority of 34 Green River murders; that he's not the only murderer, in fact they tell us they think there's another man who's committed some of the murders; that they think that their evidence tonight does link the man they're questioning to most of the Green River murders. **(3)**And here's what else we've pieced together tonight from police sources, the man's neighbors, and others: He's about 45 years old, a large man with a full beard. **(4)**He's in his second marriage. **(5)**He's a cement worker. **(6)**He's had about 20 different jobs in the past three years. **(7)**And some of that work took him into the Portland area where our sources say that they have linked him to a string of prostitute murders in that city. **(8)**The man does not especially resemble the artists' composites of men that the police have been seeking in connection with the Green River killings, but--his outdoor lifestyle does match.

Neighbor (Taped Interview): **(9)**Yeah, his very serious hobby is hunting and fishing. **(10)**He does a lot of that, primarily hunting.

Reporter: **(11)**Whereabouts?

Neighbor: **(12)**Well, it's all over. **(13)**He's done a lot of hunting up around the Greenwater area that he's told me about, and he goes up north around Stevens Pass area and through there.

Bryant: **(14)**Jack Scott is a neighbor of the man being questioned tonight. **(15)**Our sources tell us the suspect has been known to mutilate dogs that wandered into the traps he'd set for wild game. **(16)**And we've learned that animal parts have been found dumped with some of the Green River victims' bodies. **(17)**Still, while we have the man's name, we really aren't releasing it tonight. **(18)**And his neighbors tell us they are surprised by the police activity and the task force's suspicions.

Neighbor: **(19)**He's a very good neighbor. **(20)**I've enjoyed having them as neighbors. **(21)**They never caused any trouble whatsoever. **(22)**It's quite shocking to find something like this, even a suspect that close to home. **(23)**Kinda shakes everybody around here, I believe.

Bryant: **(24)**We're told that the inquiry about the man has been going on for several months. **(25)**Police say they've been proceeding very slowly because they want to be right.

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Bryant: **(26)**They're telling us that they had hoped this time that the man responsible for many, perhaps most, of the Green River murders was this man. **(27)**Police had put together a 25-page list of reasons they believed they needed to search the man's house. **(28)**But tonight the man looks less and less like a suspect. **(29)**In fact, we've just learned he passed a polygraph test. **(30)**Here's what we've pieced together about the man from police sources, the man's neighbors, and other sources: He's 52 years old, but even with a full beard he looks younger. **(31)**He's an outdoorsman, a woodsman, a hunter, and a professional trapper. **(32)**He's also a cement finisher and has worked about 20 different locations in the past three years, many of them in areas where Green River victims were found. **(33)**The man does not look like the composite drawings police have made, but his outdoor life-style does match.

Neighbor (Taped Interview): **(34)**Yeah, his very serious hobby is hunting and fishing. **(35)**He does a lot of that, primarily hunting.

Reporter: **(36)**Whereabouts?

Neighbor: **(37)**Well, it's all over. **(38)**He's done a lot of hunting up around the Greenwater area that he's told me about, and he goes up north around Stevens Pass area and through there.

Bryant: **(39)**Jack Scott's a neighbor of the man who's being investigated. **(40)**Our sources tell us that police were interested in the fact that he trapped in the very areas where many of the Green River victims were dumped. **(41)**He lives very near where several were found. **(42)**And the police are curious about his reputation for mutilating dogs that wandered into his traps set for wild game. **(43)**But his neighbors see him as a man who's kind to their children. **(44)**They say that he's a fine man to live next door to.

Neighbor: **(45)**He's a very good neighbor. **(46)**I've enjoyed having them as neighbors. **(47)**They never caused any trouble whatsoever. **(48)**It's quite shocking to find something like this, even a suspect that close to home. **(49)**Kinda shakes everybody around here, I believe.

Bryant: **(50)**We're told that the inquiry about the man has been going on for several months. **(51)**Police say they've been proceeding very slowly until now because they didn't want to make any mistakes.

Hutchison: **(52)**But have they made a mistake?

Bryant: **(53)**Well, I don't think so because you have to go through this process. **(54)**You can't walk into a man's house and search it or grab his car. **(55)**You have to have search warrants. **(56)**To get search warrants you have to have a very believable list of reasons that he might be a potential suspect. **(57)**It's difficult for the police. **(58)**What are they supposed to do? **(59)**They don't know whether the man is going to be dangerous or not. **(60)** Some man who has guns and, therefore, could hole up in his house and attack them. **(61)**I really think the police did what they felt was right and didn't really make mistakes.

Hutchison: **(62)**I guess it's the magnitude of the investigation. **(63)** That's why the media jumped on it so much last night was because they had never seen anything like this in the Green River investigation. **(64)**What do you think about that?

Bryant: **(65)**I think that's true. **(65)**Now, you have more people on the task force than you had before with all of the FBI people on. **(66)**But this was an overwhelming show of force and so the media was (sic) obviously going to jump to this conclusion.

Hutchison: **(67)**And what's next for this man?

Bryant: **(68)**I suppose he's going to be embarrassed for a little while. **(69)**But his friends and neighbors have stood loyally by him, and I don't think it's hurt his reputation. **(70)**He passed a polygraph.

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The Role of Senator Albert Gore, Jr. in Satellite/Cable Legislation

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ABSTRACT

The researcher used historical methods to trace Senator Albert Gore's repeated efforts to pass legislation designed to correct perceived inequities in the satellite/cable programming marketplace. Justification for the study: over a dozen bills now exist in Congress to roll back some of the deregulation enjoyed by the cable industry since 1984. Gore has authored more of this type of legislation than anyone and is generally regarded as the cable industry's staunchest opponent. Primary sources included Congressional aides, officials with communications industries, transcripts of Senate hearings on proposed legislation, and debates on Gore's several bills archived in the Congressional Record. The researcher determined that various political and economic forces prevented passage of Gore's 1986 and 1988 bills, yet threat of legislation had moderate effects of benefit to consumers. Because of changes at the FCC and dramatic rate increases for many cable subecribers, prediction is made that Gore's current bill has a more favorable chance of passage.

THE ROLE OF SENATOR ALBERT GORE, JR. IN SATELLITE/CABLE LEGISLATION

INTRODUCTION

The United States Congress in recent years has considered increasing numbers of issues involving cable television and other new electronic media. At this writing, several bills have been introduced in the 101st Congress which would rescind some of the regulatory freedoms granted the cable industry with the passage of the 1984 Cable Communications Act. Since the passage of that legislation, Senator Albert Gore, Jr. (D.-Tenn.) has developed a reputation as an advocate of consumer rights -- first, for owners of home satellite dishes (HSD's) and most recently for cable television subscribers.

Gore's concern that rural dish owners have access to satellite cable programming reflected the great stir that arose in the rural U.S. when satellite programmers began to scramble and market their signals on a subscription basis in 1986. In the latter part of the decade Gore broadened his efforts to represent municipal leaders and cable subscribers frustrated over unregulated rates and poor service. These issues helped him to gain national visibility during his 1988 campaign for his party's Presidential nomination; since then he has generally been regarded as cable's strongest opponent on Capitol Hill.

A review of his efforts is important because Congress and the courts will likely be faced with an increasing number of communications issues. The products of the Information Age present an array of economically-based legal/ethical questions that are difficult to answer because of the nature of the technologies. This review focuses on one Senator's efforts to legislate what he, representing his constituency, perceives as a level playing field for the many parties involved in the satellite/cable marketplace.

BACKGROUND

The Federal Communications Commission (FCC) in 1972 approved the sale and use of satellite transponder time by private companies.[1] RCA, Western Union and Hughes Communications spent millions of dollars to construct C-band domestic satellites and place them in orbit. Among their earliest customers were Home Box Office (HBO) and other "pay TV" programmers who delivered programming via satellite to the growing number of cable television system operators in the United States. From 1975 through the early 1980s, dozens of new cable TV services were launched including superstations such as WTBS and basic cable networks such as Entertainment and Sports Programming Network (ESPN).

Until 1979, the FCC required all receiving earth stations, or dishes, to be a minimum 10 meters in diameter and all earth station owners had to apply for a license. The cost of purchasing and erecting one of the huge antennas exceeded $100,000.[2] Only the well-financed companies in the booming cable industry -- such multi-system operators (MSO's) as Warner-Amex, United Artists and others -- were willing to make such investments in order to receive the popular satellite programming. Then the FCC removed the licensing and width requirements and the prices of satellite dishes decreased rapidly.

Gradually, the more prosperous rural residents began to purchase "television-receive-only (TVRO) dishes" from a variety of sources including television and electronics retailers, catalog outlets, building contractors and independent businessmen operating out of basements and garages. Many TVRO entrepreneurs advertised the sale of dishes by promoting "free HBO" and "100 channels." All of the non-broadcast television programming that was delivered around-the-clock to cable television operators was also available to home dish owners willing to make the investment. And by the mid 1980s, an individual could purchase an eight-foot dish (a popular size) with the necessary peripheral hardware for an average price of $3,500. Between one-point-five million and two million residents had private access to a variety of channels.[3]

While most of them lived in rural areas (where cable was not available) some residents of areas served by franchised cable systems became lured to the prospect of "free cable" via the home dish investment. This caused concern in the cable industry where the selling price of a cable system was determined on a per-subscriber basis, a typical price being about two thousand dollars per subscriber. If a critical number of cable "subs" chose to disconnect and buy dishes, cable system values would fall.

By the beginning of the home dish "revolution" (mid 1980s), the cable industry was enjoying rapid economic growth. The large MSO's had won valuable franchise rights to wire the nation's major cities. The National Cable Television Association (NCTA) was becoming a more powerful lobbying force in Congress. This organization had already helped push through copyright (1976) and pole attachment (1978) legislation favorable to cable operators.[4] Several major court decisions established new freedoms for cable operators and programmers. And with more Congressional help, the industry was able to gain a large measure of independence from cable's most powerful regulators, the cities (franchising authorities).

Democratic Congressman Tim Wirth of Colorado (an important cable state) was the architect of a major compromise between the National League of Cities (NLC) and the NCTA which resulted in passage of the 1984 Cable Communications Act. The bill, which was the first major revision of the Communications Act of 1934, lifted certain regulatory powers of states and municipalities over cable (such as the power to control subscription rates) while affirming some remaining powers, such as the right to require public access channels.[5]

Most of the provisions of the 1984 Cable Act attempted to resolve misunderstandings between the NLC and NCTA that had developed over franchising, but one portion -- Section Five -- dealt with home satellite dishes. One of Wirth's House colleagues, Albert Gore, Jr. (D.-Tenn.) authored this section, which was the first legislation to address certain concerns of the growing home dish industry.[6]

Gore, from rural Tennessee, was aware that a growing number of individuals were using home TVRO dishes for private viewing. He had served on a House telecommunications subcommittee which had examined issues associated with the home dish phenomenon for several years. By 1984, it was common knowledge in the satellite-cable industry that the major programmers were moving toward the scrambling of satellite-delivered video signals in order to halt the "free ride" being enjoyed by those private individuals who purchased TVROs. Also, throughout the early 1980s, the legality of such backyard reception of programming had been questioned by the cable programming distributors.[7]

Section Five of the Cable Act, written by Representative Gore, clarified the legality of home dish reception; it was legal to pick up any feeds which were not "encrypted" (scrambled) and/or "marketed". The language also prescribed stiff penalties for those who received unauthorized signals.[8]

On October 11, 1984 when the House considered H.R. 4103 (the House version of the Cable Act), Congressman Wirth stated that one of the underlying premises of Section Five was that "the marketplace is fully capable of reaching, without any government intervention, a solution to the problem of unauthorized reception and receipt of encrypted satellite cable programming."[9] In the meantime, cable programmers moved rapidly toward development of a sophisticated scrambling technology, and in January, 1986, HBO began scrambling its feeds, followed by Showtime (May, 1986), then by the cable services of Turner Broadcasting (July, 1986).[10] By the end of 1987 unscrambled programming was still available on certain transponders, but in order to receive the most popular pay and basic cable channels, a home dish owner was required to purchase a decoder at a suggested retail price of $395. Then the TVRO customer's individual "box" had to be addressed from a central data encoding facility in San Diego. This authorization occurred after the TVRO customer agreed to pay a monthly subscription fee to a cable programmer, or authorized agent.[11]

When scrambling ended the "free ride", dish owners who had invested $2,500 to $3,000 or more for hardware complained about the extra cost of the decoder and, more so, about having to pay monthly bills for programming. Freedom from cable bills was the particular reason that non-rural residents had purchased TVROs. It was no less frustrating to learn that Home Box Office's authorized "agent" for marketing home dish subscriptions in many areas was Telecommunications, Incorporated (TCI), the largest cable owner. HBO began rebating five dollars a month from the subscription of each home dish customer to the TCI cable outlet which made the sale. Critics viewed this practice as an act of collusion between cable and the program distributor which could result in an unfairly high retail price.

The rates were a great concern to home dish customers. Dish owners felt that their monthly subscription fees should never be higher than those paid by cable subscribers for comparable service; if anything, TVRO customers felt that their rates should be lower -- they had already made a capital investment in the physical plant (whereas in a cable system that investment was made by the cable operator).[12]

Ownership patterns in the satellite programming industry were an issue that evoked further suspicions of unfairness in this new arena.

TCI, the largest cable system operator, owned an interest in the new Discovery Channel and the cable services of Turner Broadcasting (WTBS, Cable News Network, and Headline News). The second largest MSO, American Telecommunications (ATC), owned HBO/Cinemax as well as interests in Black Entertainment Television (BET) and USA cable network. Such examples of vertical integration are common in the cable industry; MSO's with ownership in cable networks refer to those networks, facetiously, as "corporate must-carries."[13] Obviously, any transfer of cable subscribers to the new home dish market would not be in the best interests of cable, so why should the MSO's promote the new satellite video marketplace? These powerful operators might even encourage programmers to charge higher rates to non-cable customers.

Cable operators exerted another kind of economic control over many of the programming services. Cable networks became numerous in the early 1980s, yet many cable systems still had capacity limits; without expensive upgrades, many systems could offer no more than 12 channels. This meant that cable operators had to select from the many channel services available. If a cable MSO agreed to carry a programming service on all of its systems, it could usually negotiate a bulk discount on the rate that service charged. For example, CNN's "small system" rate might be 15 cents per subscriber per month. But a large MSO, offering delivery into several million homes, might be able to negotiate a ten cent rate. Economic survival, particularly for newer, less well-financed networks, depended upon cable carriage. It was a buyer's market, and the bigger MSO's could secure better rates.

This kind of leverage by cable MSO's over programming services could be exploited, and critics of satellite channel scrambling accused the MSO's of pressuring the programmers to scramble by threatening to drop them from their systems if they failed to comply.[14]

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Such were the concerns brought to the attention of Congressmen like Al Gore, Jr. who represented the largely rural states where satellite dishes had become so popular. If a dish owner reluctantly agreed to purchase descrambled programming, there were only two options available: buy directly from a programming service (such as HBO or Showtime), or from an authorized cable company (TCI). Why were no third parties allowed to market the satellite services? That would seem to be a necessary condition for a fair marketplace; otherwise, the two parties which controlled the direct-to-home satellite market could discriminate against customers in favor of the cable industry.

By 1986, Albert Gore, Jr. was a Senator, having won election to the seat vacated by Howard Baker. Gore, as well as Senate colleagues from states adjacent to Tennessee, such as Dale Bumpers (D.-Ark.) and Wendell Ford (D.-Ky.) were receiving numerous complaints about satellite scrambling from constituents who owned or sold home TVRO dishes. Gore had followed the satellite programming marketplace since his days on the House telecommunnications subcommittee. He concluded that the marketplace was not working in the manner predicted by Rep. Wirth.

On September 19, 1986 Gore (with Bumpers and Ford as co-sponsors) introduced S. 2823, a bill that addressed several of the home dish owner and dealer concerns. The "Satellite Television Security and Fair Marketing Bill" included a provision directing the Federal Communications Commission to begin an inquiry into how best to standardize the industry's encryption technology. The intent was to protect TVRO owners from having to buy more than one decoder in the event that different programming services used different models.[15]

The major thrust of S. 2823 mandated that cable programming services "not discriminate on price, terms, or conditions among different distributors" of video programming.[16] The bill allowed non-cable vendors of such programmming to bring suit if they felt the program distributors were charging them significantly higher rates than the cable MSO's were paying.

The cable industry became very concerned about the bill's chances for passage. The TVRO industry was waging a "potent, grass roots campaign" and it was an election year, a time when Congressmen listened more intently.[17] The NCTA enlisted the help of some powerful Senators who had been kind to the cable industry in the past; these included Barry Goldwater (R-Az.), chairman of the Communications Subcommittee and Mark Hatfield (R-Ore.), who chaired the Appropriations Committee.[18] In order to weaken the growing support for Gore's bill, HBO and Showtime responded to pressure from Wirth (the House Telecommunications Subcommittee chairman) and dropped the controversial rebate practice less than two weeks before the bill came up for consideration.[19]

On the night of the floor debate (October 2, 1986), the Tennessee Senator attacked the inequities that HSD owners faced when shopping for programming. He stated that almost a million letters had flooded Congressional offices in support of the bill. He emphasized that the bill did not propose a "moratorium on scrambling" since no one was arguing that scrambling was wrong. The bill "would have the refreshing, liberating effect of unleashing the forces of competition" by allowing third party distributors equal access to programming at rates comparable to those paid by the cable operators.[20]

The opposing debate was one of the last ones to be led on the Senate floor by the retiring Barry Goldwater, respected by the cable industry as principal author of the 1984 Cable Act. Goldwater submitted a sample comparison of monthly rates paid by cable subscribers and by home dish owners in Arizona. The comparison showed that in most cases, Showtime's package of ten basic cable services and one premium service, at $20.95, was priced lower than rates paid by cable subscribers for a basic tier and one pay channel. Goldwater also introduced a letter from FCC Chairman Mark Fowler which said, in effect, that the Gore bill was premature because of an ongoing FCC inquiry into the development of scrambling equipment and satellite program marketing.[21]

The measure was defeated 54 to 44. The fact that the FCC and Barry Goldwater opposed S. 2823 was probably the chief reason for its defeat. The Reagan FCC, headed by free-market advocate Mark Fowler, had already established its well-known philosophy of de-regulation, and this popular ideology pervaded most industries at that time. Many of the Senators who voted against Gore's bill may have shared this view; or they may have thought it too early for such a bill since scrambling had only begun nine months prior. Both sides, of course, were affected by the political alignments that influence any vote.

S. 889

Senator Gore, along with several co-sponsors, introduced a second bill -- the Satellite Television Fair Marketing Act -- on March 31, 1987 (during the next year's 100th Congress). The bill was the focus of hearings during the summer of 1987 by the Senate's Commerce Committee. Senator Ernest Hollings (D.-S.C.), who chaired that committee, favored the bill. More detailed than its precedessor of the previous Congress, this new Gore bill included provisions which:[22]

- directed the Federal Trade Commission (FTC) to conduct and complete an investigation within 120 days following the bill's effective date into pricing and distribution practices of programmers
- required the FCC to initiate a rule-making to facilitate the provision of network broadcast signals by satellite to persons living in so-called "white areas" -- regions in which viewers were prohibited by distance and/or terrain from receiving TV signals of local network affiliates.

S. 889 was heavily supported by numerous organizations represented at the Senate Commerce Committee hearings.

One of the bill's most ardent proponents was attorney Fred Finn, attorney for the Home Satellite TV Association (a TVRO retail trade group). Finn noted that sales of home satellite dishes (HSD's) had dropped 80 percent since scrambling's inception in 1986; he maintained that an inverse relationship existed between the plummeting dish sales and the escalating prices of cable systems: "Wall Street loves a deregulated monopoly."[23]

Finn said that the largest cable MSO's "had a stranglehold on the consumer" because of the economic power of cable systems over program distributors. He noted that Turner Broadcasting, as early as 1985, had announced plans to offer a package of satellite services to HSD customers. But after Telecommunications, Incorporated (the largest cable MSO) acquired an interest in the Turner services, Finn said, no further plans to serve the home dish market were mentioned by Turner.[24]

Third party representatives who had attempted to secure the rights to distribute programming testified in support of Gore's bill. An executive with Amway Corporation said his company had been shut out from distributorship as the result of MSO pressure over programming firms. The witness said the reason for the pressure was that cable systems were worth as much as $2000 per subscriber and the industry did not want to lose any business to the home dish market.[25]

Another party in support of S. 889 was the newly founded National Rural Telecommunications Cooperative (NRTC). Its chief executive testified that NRTC was assembling a package of basic and premium channel services called "Rural TV" for wholesale distribution to rural electric cooperatives and independent telephone companies which would then sell the package on a retail basis to their customers. The officer said that at that point in time HBO, the leading pay channel supplier, had refused to sell to the NRTC.[26]

But Showtime, the second most popular premium service, had agreed to service NRTC, and several basic cable networks had made similar agreements. This was used as an argument against the bill by the FCC's Chief of Plans and Policy, Peter Pisch. As in 1986, the FCC was opposed to government intervention in the satellite dish market. Pitsch testified that the FCC's analysis had concluded that no further investigation into such matters by the government was needed. Pitsch also cited a new agreement which the NBC television network had signed with a subsidiary of Telecommunications, Incorporated called Netlink. The agreement permitted the signal of NBC's Denver affiliate to be distributed by satellite for reception by home dish owners in white areas. This solution, by private businesses, addressed the problems of rural network TV reception dealt with in Gore's new bill; Pitsch cited this as evidence that the players in the marketplace were working out solutions to the rural viewers' problems.[27]

Whether this was the case, or the industry players were simply responding to the threat of legislation, is unresolved. By this time, Senator Gore was a dark-horse candidate for the Democratic Presidential nomination. Another election year was upcoming and the cable industry was nervous about Gore's growing popularity on the campaign trail.[28] Although several bills emerged in support of the home dish market in 1987, Gore's had the widest support, including the endorsement of the powerful Motion Picture Association of America (MPAA).[29]

By spring of 1988 the long list of Democratic presidential contenders had been narrowed to one, Massachusetts Governor Michael Dukakis. Gore's satellite TV marketing bill had been in the Senate for over a year and its momentum had slowed while its sponsor was busy campaigning. But Gore's candidacy had also drawn attention to the concerns surrounding satellite television scrambling and marketing. And by this time, a companion bill had been introduced in the House by Representative Billy Tauzin (D.-La.)[30]

The Tennessee Senator was hoping to bring his bill up for a vote before the August 1988 recess but could not find an appropriate bill to use as a vehicle on which to attach S. 889.[31] In the meantime, intervening events had weakening effects on both the House and Senate bills. It is conceivable that the threat of legislation influenced the industry players to set these events in motion.

On July 1, 1988, the NRTC announced that five leading programmers had signed a deal allowing the cooperative to distribute their programs: HBO/Cinemax, Disney Channel, Nikelodeon, Netlink USA and the Nashville Network. Most observers agreed that more than any other single factor, this deal worked against passage of S. 889.[32] Because free-market enthusiasts could say, in effect, "Look, the marketplace is really working and doesn't need government intervention."

Gore aide Roy Neel issued a statement saying that the Senator intended to press forward with S. 889.[33] But NRTC spokesmen said the cooperative would no longer push for the legislation. Thus, the bill lost one of its most important support organizations. The weakening effect was evident a few months later, on October 7, during the Senate floor debate.

As was the case two years earlier, Gore's bill came up for debate during the last days of the Congress, when solons were rushing to complete legislation before an early election-year recess. The Senator was again forced to use a tax bill as a vehicle for the legislation.[34]

Gore took a tougher stand against the cable industry this time, stating that "the marketplace of cable television isn't fair" and "two million plus Americans (referring to HSD owners) are suffering an injustice."[35] Having "followed this marketplace for five years," Gore said it was clear to him that cable was "working against a new industry which is asking for the same breaks the cable industry asked for."[36]

Bipartisan support came from Senator John Warner (R.-Va.), who cited rural residents' need for access to satellite programming as "basic communication from the outside world"[37] and from Senator Larry Pressler (R.-S.D.) who noted that there were many areas of the country where cable may never be available. Pressler also cited evidence that the rates which premium cable programmers charge smaller cable systems are often several times higher than those negotiated with the large MSO's through bulk discounts.[38] His point was that there existed a powerful cable/programmer "trust" which even discriminated against less powerful players in the cable industry; obviously, non-cable vendors (such as NRTC) would have to pay even higher rates, if they gained access at all.

Opposing debate began with remarks by Tim Wirth (Gore's old House colleague) now a Senator also, representing Colorado, a state where the corporate offices of many cable MSO's were located. Wirth cited as the bill's major flaw its requirement that cable programmers relinquish control of their choice of vendors:[39]

> "We do not say to Ford Motor Company, 'You can make Fords but we are going to tell you who can sell these Fords.' It is their programming and they are the ones who ought to be able to say who sells it."

After two hours of debate, the measure came up for a vote and the Senate voted 43 to 36 to table it, effectively killing any chances for reconsideration before the 100th Congress adjourned.[40] For the second time, the cable industry had blocked Gore-sponsored legislation to regulate HSD marketing practices.

On October 12, 1988, as the Senate was wrapping up for the year, Senator Gore gave notice to his colleagues that "early in the 101st Congress...we intend to press this matter again" and hinted that future legislative efforts might attempt to reverse some of 1984's cable deregulation.[41]

S. 1068

In early 1989, West Tennesee was the setting for developments which Gore has since described as typical of recent trends in the cable industry. Essex Cable, a regional MSO serving 22 communities in that part of the state, was purchased by Multivision, a larger cable operator doing business in a number of states. Basic cable rates went up 46 percent for subscribers served by each of the 22 systems.[42]

By mid-spring, Senator Gore was ready to introduce a third bill, this one addressing problems that he believed stemmed from over-zealous deregulation of cable:[43]

> "Cable television -- a service which is at the center of our country's information revolution -- is out of control. Since the industry was totally de-regulated by the government four years ago, the prices charged for basic cable service...have skyrocketed. Small, local cable systems are being bought up by speculators, determined to make a quick profit and sell out, at the expense of customers, who have no choice."

Senator Gore and co-sponsors Gorton (R.-Wa.) and Ford (D.-Ky.) introduced S. 1068, the Cable Competition Act, on May 17, 1989.[44] The bill would allow telephone companies to provide cable services, with protections against cross-subsidies from telephone revenues. There were also provisions requiring the Federal Trade Commission to investigate concentration within the the cable/programming industry, as well as speculation and traffiking in franchises. If it follows the pattern of previous Gore legislation, the bill may come up for a vote in the autumn of 1990.

Gore's current bill is credited with having an immediate effect on Multivision Cable: in late June, 1989, the MSO announced that it would reduce cable rates in 22 Western Tennessee communities.[45] Earlier that spring the Senator sponsored a workshop for municipal leaders interested in such options as the "overbuild": private or government construction of an alternative system to compete with the existing cable franchisee.[46] Long-time aide Roy Neel says the workshop helped call attention to growing consumer irritation with rising cable rates, and was another factor in the Multivision roll-back.[47]

Other effects are visible in the cable industry, although perhaps not as directly attributable to Gore's efforts as to the fact that more than a dozen bills have now surfaced targeting the cable industry for reform. To improve the industry's worsening image, many systems have announced new policies such as quicker response to complaints, but many critics say these efforts come too late for cable to escape some form of re-regulation.[48]

In the meantime, Senator Gore has introduced another home satellite bill, S. 1698, which is virtually identical to S. 889 that was defeated by seven votes in October of 1988.[49] The new measure would stiffen the penalties for piracy of satellite program signals, and for those who manufacture, distribute or sell unauthorized descrambler equipment. And like all of the Gore bills introduced so far, it calls for an investigation into pricing and distribution of programming. Such hearings have become more frequent in recent years.

SUMMARY

Since the beginning of Gore's involvement in the satellite/cable arena, he has advocated that rural and small-town American television consumers have access to the diversity of channels being offered, and at equitable rates. Those efforts began with his authorship of Section

Five of the Cable Communications Act clarifying the legality of receiving unscrambled signals via the backyard dish. Conversations with staff members reveal that Gore was originally opposed to passage of the Act, approving of its final form only after Section Five was included.[50] Thus, Gore's anti-cable position pre-dates his Senate career.

The cable industry has accused Gore of "cable-bashing" for political gain. It could certainly be argued that his 1988 campaign was helped to some extent by the grass-roots popularity of the home dish movement. But aides point out that he also made political enemies because of his hard-line efforts to curb cable's excesses.[51] A dish industry trade group, the Satellite Broadcasting/Communications Association (SBCA), was solidly in Gore's camp in 1986; now it refuses to support his Cable Competition Act because it allows "telcos" to compete against cable, and presumably against the TVRO market also. TVRO dishes have been an attractive alternative to cable; any market force which would compete with cable for video delivery into the home might provide unwanted competition to home dishes too. That is part of the unpredictability of politics, and why Senator Gore, like most politicians, finds it impossible to please all parties involved. That may be one reason why, other than Section Five of the 1984 Cable Communications Act, he has written no successful legislation in the area of satellite/cable.

But the mood in Congress is more anti-cable than at any time in over a decade and his legislation stands a better chance of passage than in previous Congresses. And the FCC, under new chairman Alfred Sikes, has recommended that restrictions barring telephone company entry into video distribution be lifted.[53] Thus, unlike 1986 and 1988, the FCC is in harmony with the intent of at least some of Gore's legislation. This also improves the chances for passage.

If the telephone companies are allowed to enter the business of cable system operation, this could open up an array of new policy questions regarding the status of cable, which has always been hard to classify: is it a mass medium, a utility, a common carrier, a publisher, or an amalgam of two or more of these? Such questions point to the intricacies of the Information Age marketplace.

Even if the legislation isn't successful, it can be argued that the steady threat of it, over the last several years, has had an effect on the industries involved:

-- Programmers ended the practice of rebating cable operators who referred home dish subscribers to them.

-- Most of the major programmers have agreed to sell to the NRTC,[54] although the rates are reportedly over 400 percent higher than those paid by even small cable systems.

-- Netlink provides several broadcast network signals to home dish subscribers who live in hard-to-reach "white areas".

Without the steady threat of legislation designed to protect dish owners from unscrupulous practices and make today's diverse television environment available to them, these gains, considered modest by many, might not have been achieved. The next effect will almost undoubtedly be some form of cable re-regulation.

NOTES

1. See for example such books on new electronic media as Lynn Schafer Gross's The New Television Technologies, 2nd ed., 1988, Wm. C. Brown Publishers.

2. Thomas E. Baldwin and D. Stevens McVoy, Cable Communication (Englewood Cliffs, New Jersey: Prentice-Hall, 1988) 2nd ed., p. 13.

3. R.H. Lochte, "Viewing Choices of TVRO Satellite System Owners: A Pilot Study Conducted in Greene County, Tennessee," 1987, unpub. doctoral dissertation, University of Tennessee, Knoxville.

4. See Baldwin and McVoy, for example.

5. "Free at Last: Cable Gets Its Bill," Broadcasting, Oct. 15, 1984.

6. Roy Neel, aide to Senator Gore, telephone interview, Nov. 29, 1989.

7. Testimony of Fred Finn before the Senate Communications Subcommittee, Hearings on S. 889, (transcript) July 31, 1987.

8. The entire text of the 1984 Cable Communications Policy Act is re-printed as Appendix E in Baldwin and McVoy.

9. See Senator Wirth's comments in the Congressional Record, Oct. 11, 1984, H 12237.

10. Baldwin and McVoy, p. 333.

11. Testimony of NCTA President James P. Mooney before the Senate Communications Subcommittee, Hearings on S. 889 (transcript) July 31, 1987.

12. Testimony of Chet Grochowski before the Senate Communications Subcommittee, Hearings on S. 889 (transcript) July 31, 1987.

13. Baldwin and McVoy, p. 219.

14. See the testimony of Fred Finn, Senator Bumpers, and Dianne Davis before the Senate Communications Subcommittee, S. 889 Hearings of July 31, 1987; also the remarks of Sen. Larry Pressler in the Congressional Record, October 7, 1989 (during the debate on S. 889).

15. Congressional Record, October 2, 1986.

16. Ibid.

17. "Cable in Lead in Hill Home Dish Fight," Broadcasting, September 29, 1986, pp. 31-32.

18. Ibid.

19. Ibid.

20. Congressional Record, October 2, 1986.

21. Ibid.

22. Congressional Record, March 31, 1987.

23. Testimony of Fred Finn, ibid.

24. Ibid.

25. Testimony of Chet Grochowski, ibid.

26. Testimony of Bob Phillips of the NRTC before the Senate Communications Subcommittee, Hearings on S. 889 (transcript), July 31, 1987.

27. Testimony of Peter Pitsch before the Senate Communications Subcommittee, Hearings on S. 889 (transcript), July 31, 1987.

28. "The Dish Crowd Fights for a Pipeline in the Sky," Channels 1988 Field Guide, p. 99.

29. Ibid.

30. "Cable Comes to Compromise on TVRO," Broadcasting, July 4, 1988, p. 34.

31. "Where Things Stand (Scrambling)," Broadcasting, September 12, 1988, p. 92.

32. "Cable Comes to Compromise on TVRO," ibid.

33. Ibid.

34. "Gore's TVRO Bill Dead For This Year," Broadcasting, October 17, 1988, p. 17.

35. Congressional Record, October 7, 1989.

36. Ibid.

37. Ibid.

38. Ibid.

39. Ibid.

40. "Gore's TVRO Bill Dead For This Year," ibid.

41. Congressional Record, October 7, 1988.

42. Senator Albert Gore, Jr. for Scripps-Howard News Service, "Self-regulating monopoly gives customer no choice," Knoxville News-Sentinel June 4, 1989, p. F1.

43. Ibid.

44. Ibid.

45. Rachel Thompson, "Multivision Cuts Back Rates in Tennessee," Multichannel News, June 26, 1989, p. 1.

46. Ibid.

47. Roy Neel, aide to Senator Gore, telephone interview, November 29, 1989.

48. Dennis Kneale, "Why Viewers Would Like to Zap Their Cable Firms," Wall Street Journal, March 19, 1990, pp. B1, B6.

49. "Gore Introduces Home Satellite Bill," Broadcasting, October 9, 1989, p. 82.

50. Jackie Shrago, aide to Senator Gore, telephone interview, July 17, 1989.

51. Roy Neel, aide to Senator Gore, telephone interview, November 29, 1989.

52. "Eastern Cable Highlights Issues from DBS to Syndex," Broadcasting, September 4, 1989, p.55.

53. "The 'irreversible momentum' of Al Sikes," Broadcasting, October 9, 1989.

54. Bill Dorran, NRTC Director of Finance, telephone interview, July 20, 1989.

The Law of Quotation Marks: **Masson v. New Yorker Magazine, _et al_. 1989**

a Law Division paper on the panel
"Ethics and Law: Who Draws the Line Where?"
presented at the annual convention of the
Association for **Education** in **Journalism and Mass** Communication
Minneapolis, Minnesota, August 1990
by
David Eshelman, Ph.D.

Background

When engaged in writing, authors utilize certain conventions in order to enhance the communication process. The obvious conventions are the use of standard words of the language, grammar, spelling and punctuation. But within those conventions there are variations which are permitted for a variety of reasons.

One example of variation has historically been known as the "poetic license" which is "The liberty allowed to the poet to wrest the language according to his needs in the use of figurative speech, archaism (q.v.), rhyme (q.v.), strange syntax (q.v.), etc." (Cuddon, 508)

Journalists are often confronted with certain situations wherein it is considered appropriate to engage in variations from the norm, a practice sometimes referred to as the "journalistic license." One example of that practice is the alteration of

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"letters to the editor" wherein the editor might correct the spelling or grammatical errors in order to minimize any embarrassment to the writer, or the editing out of profane or obscene words. Another example is the deletion of certain words or phrases, especially when quoting leaders within the society (politicians and clergy, as prime examples) so that offensive words or phrases are either changed or deleted from the actual statements made by the person. And journalists obviously do not include the exact utterances of speakers, since the "uh"s and "am"s and the "I,I,I'm"s are routinely omitted. (See, for example, the article by McManus.)

From a professional, or perhaps more appropriately termed "ethical" perspective, any change raises ethical issues. Hulteng states in his book on media ethics that:

> The impression created by a quotation can be as important as the literal accuracy of that quotation, and thus placement and context become elements of reality so far as the perception of the quote may be concerned. So when a reporter--or the writer of a book, for that matter--undertakes to "rejigger" someone else's ideas or observations he lies under a strong ethical obligation to be sure that he has not tampered with the essential reality ofthe material. (at 74, emphasis mine)

It would appear by the use of the word "rejigger" and that the journalist is under a strong obligation to be sure "that he has not tampered with the essential reality of the material, "that some latitude must be afforded to change the quotes, as long as the "essential reality of the material" remains intact.

Problem Statement

This "journalistic license," the practice of changing original statements to conform to the norms of society, or in compliance with the Hulteng statement of remaining true to "the essential reality of the material" can give rise to both ethical and legal issues. To wit: to what extent is it ethical and/or legal to change the actual statements of a person when reporting on the event in which the original words were uttered.

If the journalist is using the convention of indirect quotes it is generally understood that the reporter is transliterating the quotation into his/her own words. But when the journalist utilizes the convention of direct quotes and thus utilizes quotation marks, the reader might presume that the quoted words reported are indeed the actual words of the speaker, unedited or corrected in any manner. That general perception was confirmed by Culbertson and Somerick in a 1976 article published in Journalism Quarterly, wherein the authors documented that 80% of a sample understood that quotation marks meant verbatim reproduction. (at 465) But that, of course, is not the case in many instances, such as in the letters to the editor or in "corrected" statements of prominent persons in the society.

In a more recent article by Lehrer published in Journalism Quarterly (1990), the author demonstrated by the comparison of tape recorded material when compared to "quoted" publication that "the accuracy of the quotations is low' (at 903) despite the fact that "most of the changes do not affect the meaning, and those that do are subtle or rhetorical in nature." (at 904) The Author also concluded that "Even more substantial changes are usually compatible with the intentions of the speakers." (at 904) (See also Berry; Blankenbury; Charnley; Ryan and Owen; Stephens and Franke)

But this issue of changing quotes is not unique only to the journalist. A more egregious example is that the words printed in the Congressional Record, a publication alleged to report the speeches presented on the floor of Congress, are actually subject to editing by the representatives and senators after they have spoken. In this manner these persons can actually control the content of the publication to assure that it contains what they wish they would have said, rather than what they actually said!

For those involved in journalistic writing, there is no Constitutional immunity for their reporting like the immunity granted representatives and senators speaking in Congress. Thus, when a person is "quoted" in a manner which is not an accurate representation of the actual words spoken, the journalist becomes subject to potential scrutiny and legal liability. Such was the situation in the case at hand, Masson v. New Yorker Magazine.

A problem of superficial analysis of that case is that the report in Time ("The Weekly News Magazine") states that there is "The Right to Fake Quotes," and Editor & Publisher ("the weekly journal of newspapering") headlines "9th Circuit: It's OK to make up quotes," while according to Presstime (a publication of the American Newspaper Publishers Association) the claim is made that "Headlines overstate real thrust of ruling on imprecise quotes, lawyers say." Such oversimplifications need to be clarified by analysis of the holding of the court. Thus a review of the relevant precedent in such cases, with the focus on the Masson v.

New Yorker case.

The Masson v. New Yorker Case

The Facts

In 1983, Janet Malcolm published a two-part article in The New Yorker magazine concerning the termination of psychoanalyst Jeffrey M. Masson from his position as Projects Director of the Sigmund Freud Archives. The article, subsequently reprinted in book form by Publisher Knopf, was largely based upon Malcolm's tape-recorded interviews with Masson. In the article Malcolm described the disagreement between Masson and other board members of the Archives regarding a particular theory of Sigmund Freud. Malcolm discussed Masson's claim that his contract with the Archives was terminated because he went public with his views simply to further his career and placate his colleagues. (Masson v. The New Yorker Magazine, Inc., 895 F.2d. 1535 at 1536)

In 1984, Masson filed a suit against Malcolm, The New Yorker, and Knopf. Masson contended that the defendants libeled him and placed his in a false light in violation of the California privacy statute (Cal.Civ. Code ss45). Masson contended that Malcolm fabricated words attributed to him within quotation marks, and misleadingly edited his statements to make him appear "unscholarly, irresponsible, vain [and] lacking impersonal [sic] honesty and moral integrity. He also charges that The New Yorker and Knopf knew of Malcolm's misconduct prior to publication of the article and book." (895 F.2d. 1535 at 1536)

The district court granted the motion for summary judgement (dismissal of the case) on August 17, 1987, on the ground that Masson had failed had failed to establish the basis of such legal actions (the malice standard). (686 F.Supp. 1396 [N.D.Cal. 1987]) The U.S. Ninth Circuit Court of Appeals heard the appeal of plaintiff Masson, but on August 4, 1989, affirmed the decision of the trial judge that the case was without merit, lacking in "clear and convincing evidence that the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice...the standard for summary judgement established in Anderson v. Liberty Lobby (1986)." The decision by the court of appeals, however, was sharply divided on the summary judgement decision. Two justices affirmed, but there was a vehement dissent by the third judge. Extensive opinions were issued by the justices. The three judge decision was affirmed on a Denial of Rehearing and Rehearing En Banc by the United States Court of Appeals, Ninth Circuit, on February 15, 1990. (895 F.2d.1535)

Precedent for the Decision

Both the trial court and the court of appeals relied upon precedent in this case. The court of appeals noted at the outset that "neither the United States Supreme Court nor the California Supreme Court has had occasion to address the question whether a finding of malice may hinge upon evidence showing that a defamatory statement attributed to a person by using quotation marks does not contain his or her exact words. One California appellate court, however, has addressed the question, as have several federal courts of appeals." (at 1537)

Despite that disclaimer, we need to note at the outset of this part of the discussion, that the United States Supreme Court did reverse a Court of Appeals decision in an obvious fabrication of quotes case. That case is the Cantrell v. Forest City Publishing Co. case of 1974, but not relied upon by the Ninth Circuit in the Masson case.

In the Cantrell case, based upon the false light theory of invasion of privacy, the news report contained a number of inaccuracies and false statements. Most conspicuously, although Cantrell was not present at any time during the reporter's visit to her home, the journalist made descriptions of her and included to direct quotes from her. Those were blatant examples of fabrications. That was a blatant example of malice, the U.W. Supreme Court concluded, affirming the trial court's award of damages.

But in the case at hand, there actual interviews, and the United States Ninth Circuit Court of Appeals concluded that any inaccuracies in the quotations did not constitute actual malice. There were two contentions by Masson. The first was that there were several "fictionalized" quotations. (at 2090) After analysis of the recordings and the publications, the court concluded that these so-called fictionalizations actually reflect "the substance of Masson's self appraisal," of "did not alter the substantive content," (at 2095) or "did not alter the substance of Masson's comments," of "were a rational interpretation of Masson's ambiguous remarks," (at 2096) or "did not constitute a substantive alteration of the response Masson claims he made." (at 2097)

The second contention was that the publications contained "misleadingly edited' quotations." (at 2097) After analysis of the recordings and the publications, the court concluded that "Malcolm's interpretation of Masson's comment was rational," or that "the statement Malcolm ascribed to Masson was a rational interpretation of his ambiguous remarks." (at 2098)

In coming to these conclusions and the decision that the district court's order granting summary judgement to Malcolm and the New Yorker be affirmed, the Ninth Circuit did not act in a vacuum. There was persuasive precedent cited from three United States Courts of Appeals and a California court of appeals. Two of the circuit court's decisions favored the writer, while one favored the plaintiff in a blatant fabrication situation.

The third United States Circuit held in Dunn v. Gannett New York Newspapers in 1987 that the use of the word "pigs" to capsulize in a headline the comment that "You have a lot of new people moving into the City of Elizabeth, some coming from foreign lands where abject poverty was something they lived with everyday and they have not yet been assimilated into our type of society, and it will take a great deal of time for some of them to respect the rights and the properties of other people, and above all, to respect a city that offers them a home in what I consider to be a wholesome environment "was a fair, albeit inadequate translation of the relatively new additions to the American vocabulary of the words 'liter,' 'literer', or 'litterbug'...." (at 488, emphasis mine) Thus the concern in synthesizing quotation seems to be on the 'fairness' of the transliteration.

The second United States Circuit, in Hotchner v. Castillo-Puche in 1977, was confronted with the situation that the author of a book published in Spanish quoted author Ernest Hemingway as describing the public figure plaintiff as "dirty and a terrible ass-licker, I wouldn't sleep in the same room with him." The publisher of the English-language edition of this book 'toned down' this quotation, quoting Hemingway as stating that "I don't really trust him." (at 912) The plaintiff sued for libel contending that the evidence it presented showing that the publisher "knowingly published a bowlderized version of Hemingway's alleged statement" which was sufficient to establish that the publisher acted maliciously (at 914) The court conceded that "in transforming Hemingway's words into the much milder 'I don't trust him,'...[the publisher] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement...." Thus "there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth." (at 914) The United States Supreme Court denied cert. sub nom. Hotchner v. Doubleday & Co. (434 U.S. 834 [1977])

In contrast, the seventh United States Circuit in 1976, in Carson v. Allied News Co. reversed the district court's order granting summary judgement to the defendants, thus paving the way for determination by the jury as to whether actual malice existed in a "completely fabricated" quotation attributed to the plaintiff. (at 212) The court held that "Because of...the wholly imagined but supposedly precisely quoted conversations regarding the purported struggle preceding the westward move of the Tonight Show, the plaintiffs are entitled to a jury's determination of whether actual malice existed." (at 213)

Likewise, the California appellate decision in Bindrim v. Mitchell in 1979 also ruled in favor of the plaintiff. Here the author defendant, in alleged novel, quoted an allegedly fictional psychiatrist as demanding, in a profane and insensitive manner that a patient "drag" his wife to a "nude marathon." (at 70-71) The plaintiff, a psychologist public figure, sued for libel claiming that the book was actually about him, and that the defamatory quotations attributed to him were fictionalized. The plaintiff produced a tape recording of a therapy session which the author attended and the tape disclosed that the psychologist had merely suggested, in a non-profane and sensitive manner, that the patient bring his wife to a nude marathon. The jury found that the book was not fiction, that the quotations attributed to the psychologist were false and defamatory, and that the defendant published the quotations with actual malice. The appeals court affirmed. (92 Cal. App.3d 61, cert. denied, 444 U.S. 984 [1979])

Those were the cited precedents. But in a more recent decision than the Masson case, the Sixth Appellate District of the California Court of Appeals held in Fletcher v. San Jose Mercury News (November 9, 1989) that the conflict between a reporter's notes as to what he was told by a source, and the source's quote as included in an allegedly defamatory newspaper article, is not itself sufficient to demonstrate actual malice, since the quote as reported was not so improbable as to support an inference that the reporter deliberately falsified the source's remarks, and also since the reporter demonstrated his good faith by reporting in a subsequent article the source's claim that he had been misquoted. (17 Med.L.Rptr. 1321, emphasis mine) The emphasis here is on the probability of the quote in determining whether the reporter acted with actual malice, and the good faith statement of clarification. The court concluded that actual malice was not proved by clear and convincing evidence regarding the libel claim emanating from the disparity between the reporter's notes and the published quotes, and therefore the court of appeals affirmed the trial court's order granting the respondents' motion for judgment notwithstanding the verdict.

Summary of the Law

It appears that the current law governing the defamatory or false light nature of statements ostensibly ascribed to another person by the use of quotation marks can be summarized as follows:

A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination, and in so doing portrays the plaintiff in a false light. (See Cantrell and Carson)

An author may, however, under certain circumstances, fictionalize or alter quotations to some extent. (See Hotchner, Masson and Fletcher, but also see the limitations in Bindrim and in the Masson dissent.) Here the guidelines are "fairness" of the transliteration.

Malice will not be inferred from evidence showing that the quoted language does not contain the exact words used by the plaintiff provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure (dunn, and the additional cases of Bose and Time, Inc. v. Pape), or do not "alter the substantive content" of unambiguous remarks actually made by the public figure.(Hotchner)

In more conversational terms, the journalist might be granted latitude in reporting on events and in so doing to misquote or even rephrase a statement within quotation marks, without incurring a liability. But the limits are obvious in the Cantrell and Bindrim cases. Don't blatantly fabricate quotes or distort them beyond reasonable transliterations. Distorted quotes which can establish with clear and convincing evidence that there was reckless disregard for the truth have a high probability of incurring for the journalist a liability.

Those legal standards seem to be consistent with the Hulteng ethical standard of being true to the 'essential reality of the material."

But there exists the third dimension in a triad relationship: The professional ethics, the tolerance of the law and the credibility of the media with the public. The perception of the public regarding the meaning of quotation marks is at variance with the ethical and legal standards. This variance raises a concern regarding the credibility of the media when the use of quotation marks does not mean that the words quoted are the actual words used by the person to whom they are attributed, but that is the perception of the public. This discrepancy could ultimately result in an erosion of the credibility of the news media, whether the quotation marks are in print or result from creative editing in the electronic media.

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CONCEPTUAL PROBLEMS OF BROADCAST INDECENCY POLICY AND APPLICATION*

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"Conceptual Problems of Broadcast Indecency Policy and Application"

Introduction

How does one define what is "indecent" in the broadcast context? Despite the fact that such definitions are problematic, the U.S. Federal Communications Commission (FCC) by 1990 was left to categorize what was or was not indecent by applying a generic legal definition. In a series of judgments made in 1989, the FCC had determined that a few of many broadcasts under review were indeed "indecent" under the regulations, but there was little articulation of the rules employed to make such decisions.

The purpose of the present paper is to analyze the recent decisions in light of the legal standard, past FCC decisions, normative values employed by regulators, U.S. Supreme Court interpretations and general policy.

This paper advances the view that a simple qualitative, descriptive assessment of broadcast content is insufficient in leading to an understanding of the content itself, the regulatory decision-making process or the communication organizations behind the content. Further, a policy analysis runs the risk of failing to take into account that such content has a social context.

Following an analysis of policy and the recent evidence before the FCC, a research approach is advanced to compare systematically the similarities and differences between broadcast content determined to be indecent, and that which is not.

A Brief History of Broadcast Indecency

Federal regulation of broadcast "indecency" has sparked academic and professional debate, especially during the past two decades.[1] Armed with substantial regulatory authority,[2] the Federal Communications Commission developed policy to restrict certain forms of non-political speech.[3] The early 1970s were years in which the Commission found itself reviewing content of radio programs--including the speech of announcers, music lyrics and audience members.[4]

Broadcast policy evolved concurrently as the nation's highest court considered the degree of constitutional protection for speech, generally,[5] and the application of free expression theory in the broadcast context.[6] By the time of the Pacifica[7] decision, dealing directly with over-the-air indecency, the FCC itself had begun to develop a philosophy which argued for a need to protect children.[8]

Language in the 1934 Act[9] and in a criminal statute[10] provided the FCC with an apparent right to penalize, if not forbid, obscene and indecent broadcasts.[11] Whether the offensive words were in a poem,[12] a taped interview with a rock musician,[13] or "topless" radio talk telephone calls,[14] the FCC had begun to take the view that some, but not all, discussion of sex was improper.[15] In particular, use of specific words or innuendo could place the broadcast licensee under FCC review.[16]

The Pacifica[17] decision failed to solve the problems of FCC regulators faced with a case-by-case approach of enforcement.[18] After a brief lull following the U.S. Supreme Court decision, broadcasters--radio stations, in particular --returned with new formats which challenged the ability of the Commission to define indecent programming.[19]

The present paper traces the history of the broadcast indecency issue to a recent line of cases. The goal is to analyze recent action by the Commission and identify underlying principles. A series of research questions were considered.

Research Questions

1. What generalizations can be derived from recent FCC indecency action against radio stations?

2. Have new regulatory principles emerged since the Pacifica[20] decision? If so, what are they?

3. Is it possible to define and implement a coherent policy on the regulation of indecent language? If so, how?

4. What social values underlie the need to regulate broadcast indecency?

5. Is the legal authority to regulate indecency a sound one? If so, are clarifications needed? If not, where are the weaknesses?

6. Is there a way to refine research into the indecency issue? How can mass communication theory and systematic methodology be employed to advance academic understanding of broadcast indecency?

Problems Associated with Legal Content Definitions

Debate over restriction of "indecent" content in broadcasting--whether that be over-the-air, cable or newer methods--continued in the 1980s[21] with little attention paid to three important issues: (1) the failure to define indecency or even clarify a distinction with obscenity which does not fall under the umbrella of constitutional protection[22]; (2) the nearly unquestioning assumption that there is a strong interest in the "protection" of children from "indecent" broadcast content;[23] and (3) the lack of analysis through observation of regulator decisions to categorize some content as "indecent."

While little predictive theory has emerged in the research, Kleiman has found three legal dimensions to the issue of indecent cable television broadcasts: (1) the privacy argument that individuals have a "right" to keep their homes free of invasion by indecent cable programming; (2) the strong interest in the protection of children; and (3) the application of the scarcity rationale to cable content regulation by government entities.[24] Yet, the jurisprudential record more pits the first amendment right of broadcasters against the need of government to "assist parents" as best they can.[25] The call for "social responsibility" in the form of self-regulation has come from FCC commissioners who traditionally support the industry model of limited government intervention.[26]

Regulation of Language

Serious conceptual difficulties emerge when a governmental entity attempts to define media regulation in terms of language.[27] In areas outside of broadcasting, the academic community has begun to understand that definitions carry with them evaluative interpretations.[28] Thus, attempts to apply exacting definitions to broadcast content considered "indecent" have been criticized as unrealistic.[29] Still, broadcasters face real action by the FCC when the political process pressures application of law without regard for the difficulties.

Obscenity: A Special Case

Any discussion of broadcast indecency must first distinguish it--at least as precisely as possible for legal reasons--from obscenity.[30]

Obscenity has not gained constitutional protection.[31] It has been defined as that content which appeals to prurient interest based upon contemporary community standards, depicts patently offensive sexual conduct and lacks serious value.[32] In the case of broadcasting, however, the waters are muddied in the amended Communications Act of 1934[33] or a separate criminal law, 18 U.S.C. Sec. 1464, which lumps together obscene, indecent and profane language instead of employing a dichotomy.[34]

The Legacy of Pacifica

A single complaint apparently prompted action which led to the most significant legal discussion, to date, on broadcast indecency.[35] By now, most are familiar with the case. In short, a George Carlin monologue--"Filthy Words"--was broadcast on a New York station.[36] The station responded to FCC inquiries by defending Carlin as a social satirist.[37] The single broadcast, however, did not lead to direct FCC action; instead, it merely produced an order on file which could be considered if there were future complaints against the station.[38]

The FCC found that broadcasting was unique because of traditional scarcity arguments.[39] Given this assumption, regulation against indecency could occur, the FCC reasoned, because access by children was unsupervised, because screening was difficult for adults, and because privacy of the home justified it.[40]

The FCC action against the 2 p.m. broadcast was not seen as enforcement of an outright ban, but rather part of a "channeling" policy to move indecent programs to times of day when children were not likely to be in the audience.[41] It was not clear, however, how the channeling approach could be squared with Sec. 1464.[42] In part, the conceptual tiptoeing emerged because Sec. 1464 was not consistent with a separate prohibition against "censorship."[43]

A divided U.S. Supreme Court in Pacifica found: "A requirement that indecent language be avoided will have its primary effect on form, rather than content, of serious communication," and that, "There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[44]

But a dissenting opinion noted that "taboo surrounding the words" in the Carlin monologue was not universal.[45] Justice Brennan rejected the idea that alternative words are always useful: "it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications."[46]

Following Pacifica, FCC enforcement "was nonexistent" until 1987.[47] Action against individual stations,[48] and a changing political environment,[49] led to movement toward a more clearly defined policy.[50]

Politics and the 24-hour Ban

In late 1988, when the Federal Communications Commission issued its 24-hour ban on indecent broadcasts, it made it clear that the new Sec. 1464 enforcement rule came "Pursuant to a recent Congressional directive," and that the enforcement was "required by the express language of this new legislation."[51] In plain terms, the FCC was faced with an order from the Congress--a direct command enforceable through agency budget control--to crack-down on the industry. It has long been understood that communications policy operates within such political context.[52]

The rule amounted to a re-interpretation of 18 U.S.C. 1464[53] which previously had been applied "to prohibit the broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children might be in the audience."[54] FCC interpretations of Pacifica had apparently treated repeated use of the Carlin words only where context could be seen as "pandering."

FCC Order and the Diaz Statement

On December 19, 1988, the FCC adopted an order to enforce Sec. 1464 "on a 24 hours per day basis."[55] Noting that the agency funding bill--Pub. L. No. 100-459--signed by then President Reagan October 1, 1988 required the FCC to promulgate such an order, the agency fell into "compliance."[56]

The FCC was forced to ignore the precedential value of rules that prohibited "obscene" broadcasts, but allowed "indecent" material when the risk was minimal that children were in the audience.[57]

Commissioner Patricia Diaz Dennis, in a separate statement, raised the critical issue: "I have serious doubts whether our new rule will pass constitutional muster."[58] She noted that the Pacifica ruling was narrow, emphasizing the time of day of a broadcast as a variable.[59]

At the same time that the FCC was faced with the continuing precedent of Pacifica, it also was left to deal with the U.S. Court of Appeals for the District of Columbia: it has ruled that the FCC has not justified even a 10 p.m. to 6 a.m. rule for "channeling" indecent speech.[60] How then, Diaz wondered, could "an outright ban" be justified?[61] All eyes turned back to the Supreme Court as it prepared to rule on language used by telephone services.

Dial-A-Porn: Sable Communications

In the case of "dial-a-porn" telephone messages, related to the broadcast issue by FCC notice, the U.S. Supreme Court in 1989 ruled that indecent but not obscene messages are constitutionally protected.[62] In striking down a Congressional ban, the Court refused to define the difference between the two types of speech.[63] Further, the Court balked at the opportunity to directly use the case as a vehicle to re-think the Pacifica ruling.[64]

In Sable Communications v. FCC, in an opinion delivered by Justice White, the Court treats telephone indecency and broadcast indecency as "distinguishable" because of "an emphatically narrow holding" in Pacifica.[65]

> Pacifica is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material. The FCC rule was not "`intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'"[66]

In Pacifica: "The issue of a total ban was not before the court."[67] Still, the precedential value of Sable is minimal in the distinct case of broadcast indecency because of the Pacifica finding that broadcasting has a "uniquely pervasive" ability to "intrude on the privacy of the home without warning as to program content"--content parents might want to keep out of reach of small children.[68]

> Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.[69]

While the Court did not tamper with Pacifica, it surely did provide the lower court with a basis to strike down a 24-hour ban by reiterating in the broadcast context that: "the government may not `reduce the adult population ... to ... only what is fit for children.'"[70]

The Court, then, took a functional approach rather than a content-based approach by accepting the notion that government is free to regulate to "protect" children only: "For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages."[71] That would be acceptable, in the view of the Court, if it were not for the concurrent effect of limiting access to adults: "It is another case of `burn[ing] up the house to roast the pig.'"[72]

In a concurrence, Justice Scalia agreed with the view "that a wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternate proposal would be circumvented by as few children as the evidence suggests."[73] But he went further in appearing to question the shaky legal distinction between indecency and obscenity:

> But where a reasonable person draws the line in this balancing process--that is, how few children render the risk unacceptable--depends in part upon what mere "indecency" (as opposed to "obscenity") includes. The more narrow the understanding of what is "obscene," and hence the more pornographic what is embraced within the residual category of "indecency," the more reasonable it becomes to insist upon greater assurance of insulation from minors.[74]

The theory advanced here raises questions. First, must one view "indecency" as residual or "left over" speech, protected only because it is not obscene? Or does it make just as much sense to view it as that which has not crossed a prohibited government line? Second, must we think of indecency-obscenity as a continuum? If so, what specific elements contribute to an increasing level of prohibitive speech or behavior? Third, on what grounds does an increasing degree of obscenity warrant stiffer safeguards? Fourth, how can one categorize one group of messages as obscene, another group as indecent and a third group as neither, where no specific rules of categorization exist?

The concurrence in part, dissent in part, of Justice Brennan, joined by Justices Marshall and Stevens, speaks more to the issue of definitional problems. Citing his own words in Paris Adult Theatre I, Brennan repeats: "the concept of `obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid very costly institutional harms."[75] Here, the functional concern is with a chilling effect on producers of material irrespective of how specific audience members view it as "indecent" or "obscene." The Court, having failed to specify a definition--perhaps because it is so problematic--retreats: "Hence, the Government cannot plausibly claim that its legitimate interest in protecting children warrants this draconian restriction on the First Amendment rights of adults who seek to hear the messages that Sable and others provide."[76]

Despite the fact that the Sable decision left the Pacifica ruling as law, interpretations by lower courts and regulators speak to definitional difficulties.

Even before its decision on the 24-hour ban--the so-called "Helm's amendment" or "congressional mandate"--the issue was a potent one. The previous FCC attempt to move from a midnight "channeling" to a 10 p.m. "safe harbor" approach for indecent broadcasts was not endorsed.[77] But court and legislative pressures appeared to leave the FCC in the middle of a larger political struggle. U.S. Senators were critical of the broadcast of "sexually explicit material;" an apparent weakening of self-regulation; and "the Fowler-Patrick-Reagan-Bush mentality of letting the marketplace allow some broadcasters to exploit young minds and ignore community standards for the pure sake of ratings and profits."[78]

Broadcast Indecency and the Larger Content Regulation Issue

At the heart of the government's "legitimate interest" in the protection of children is the assumption that pornography can lead to negative societal outcomes. Fueling the debate today are the echoes of serial killer Ted Bundy, who hours before his execution, told Christian broadcaster James C. Dobson that porn "snatched me out of my home."[79] Building from a controversial 1986 report that concluded studies on pornography demonstrated a causal link between it an violence, the argument goes: "It is time that the charade of hard-core pornography's innocence ended."[80] But on the other side of the media debate are those who fear censorship and suggest that people such as Bundy suffer more from the effects of violent relatives than from the exposure to explicit images.[81]

FCC Action Against Stations

By May 1989, the commission's Mass Media Bureau had drafted "letters of inquiry"--essentially charging stations with violating rules by transmitting indecent broadcasts.[82] With the legal issues unresolved, Broadcasting reported that the "FCC believes it can take action against `daytime' broadcasts only."[83] In October of 1989, ninety-five complaints were "disposed of by the Commission,"[84] while "notices of apparent liability" were sent to a handful of stations.[85] Stations KFI, Los Angeles, WIOD and WZTA-FM, Miami, and KLUC-FM, Las Vegas faced action.[86] Four other stations sought additional information.[87] In November, an additional liability letter was sent to WLUP, Chicago.[88] Meantime, by mid-1990 the general policy was still under study by an FCC collecting evidence on children and media use.

Evidence of Indecency

The 1989 Federal Communication letters to stations came in several waves. There were three letters on August 24, seven letters on October 26, and two follow-up letters--on November 30, 1989 and one on January 17, 1990.[89]

The August 24th Letters. Evergreen Media Corp. (WLUP-AM) received complaints about the "Steve and Gary Show" broadcast in Chicago.[90] The licensee was reminded about Section 1464 prohibitions against indecent language and the policy of the FCC to enforce it.[91] The Complaints and Investigations Branch alleged, "it appears that, in context, the material broadcast is `clear and capable of a specific, sexual meaning' and is patently offensive."[92]

The FCC cited a transcript from a March 30, 1989 broadcast at 5:10 p.m.:

> Bruce Wolfe: He's (Bob Costas) trying to defend this Vanessa Williams. I mean she's a, the most embarrassing pictures that you ever saw in your life in Penthouse. I don't know and he's talking about how she actually had more talent than your typical MIss America. I'll say.
>
> Steve Dahl: She was licking that other woman's vagina. I want to tell you pal.[93]

The FCC also cited text from an August 19 broadcast in which a caller talked about "Kiddie Porn" and joked about a "gay bar."[94]

Using the same indecency standards, the FCC sent similar letters to other stations on August 24. KSJO, San Jose's "The Perry Stone Show" was cited for a series of alleged violations during the morning drive shift in 1988.[95] Some of the incidents involved exchanges with callers:

> Caller: What do you want?
>
> Perry Stone: I love you. I'd love to, I'd love to lick the matzo balls right off your butt. As a matter of fact, I'd put it right there in the middle.[96]

Stone was also cited for use of unfit song lyrics such as: "My pussy cat was rocking in the rocking chair, rocked so long he lost his hair..."[97]

WFBQ-FM, Indianapolis ran afoul with its "Bob and Tom Show" in September of 1987:

> Elvis: So you talk to Dick Nixon, man you get him on the phone and Dick suggests maybe getting like a mega-Dick to help out, but you know, you remember the time the king ate mega-Dick under the table at a Q95 picnic, so that's pretty much out of the question. And then you think about getting Mega-Hodgie, but that's no good because you know, the King was a karate dude and although Mega-Hodgie can take a punch...[98]

As early as November of 1987, WFBQ had been the target of a group called Decency in Broadcasting which placed a $ 5,000 advertisement in the Washington Post: "Radio stations, such as WFBQ in Indianapolis, should be brought to task" over sexual innuendo and bathroom humor.[99] The station's parody problems extended to the the language used in fake spots:

> Introducing Butch beer, the first beer brewed for women, by women. When you grab a Butch beer, your taking hold of the Billie Jean King of beers. Fire brewed from the gushing waters of French Lick, Indiana. With Butch beer, you've got a beer that goes down easy. Taste it and you'll know why it's our personal best..[100]

Such parody spots depend upon implicit understandings, creating the most difficult enforcement issues for the FCC. The WFBQ-FM case led to a follow-up letter on January 17.[101] At-issue was the repetition of already noted material in the previous FCC latter:

> The Commission now has information that at least two segments which were cited in the letter of inquiry were repeated on the Bob and Tom Show. Specifically, the segments originally broadcast on September 25, and June 29, 1987... were again broadcast between 6:00 a.m. and approximately 10:15 a.m. on August 25, 1989. The Commission also believes that new material broadcast on March 21 and April 13, 1989, by WFBQ(FM) may have violated 18 U.S.C. Section 1464 (transcripts attached).[102]

The charge of new material would be more serious for WFBQ since the licensee could always make the case that the August 24 letter had not been reviewed at the time of the August 25 broadcast. A station already under investigation, would be expected by the Commission to take greater care in the production of new material.

The October 26th Letters. Complaints leveled against Cox Broadcasting, licensee for WIOD, Miami, followed the same general tone of the earlier complaint letters.[103] That station admitted also airing a "Butch Beer Commercial" on the "Neil Rogers Show."[104] The Commission Chief of the Mass Media Bureau Roy J. Stewart wrote:

> Even in the cases of innuendo, not only was the language understandable and clearly capable of a specific sexual meaning but, because of the context, the sexual import was inescapable.[105]

Stewart said reasonableness of context was no defense, and the station could not rely on the safety of lack of action by the FCC:

> ...Whether or not the context of the entire Neil Rogers Show dwelt on sexual themes, the songs themselves provide sufficient context to determine their patent offensiveness and can be considered discrete units for purposes of this action. And whether or not the material here at issue is less graphic than that previously found indecent by the Commission, we do not accept constraints on our discretion to pursue violations less egregious than others have been.[106]

The FCC rejected the licensee's arguments that the broadcasts of the songs "Jet Boy, Jet Girl," "Penis Envy," "Candy Wrapper," and "Walk with an Erection," fit with "contemporary community standards," were "acceptable slang," and were supported by the evidence of audience ratings.[107] The action by the FCC was pleasing to Republican Senator Jesse Helms of North Carolina who found it "`heartening' that the new FCC was moving so quickly to protect children from `this garbage'."[108]

> Broadcast indecency is a violation of federal law and its popularity in any particular community does not change that fact. But more importantly, the focus of our indecency standards must be on the risk to children in the audience.[109]

WIOD, Miami was fined the maximum $ 10,000 penalty.

Station WZTA-FM, Miami--operated by Guy Gannett Publishing--also received on October 26 letter based on its broadcast of the "Penis Envy Song."[110]

Station KLUC-FM--licensed to Nationwide Communications --was notified of a complaint about the playing of the Prince, Warner Brothers song "Erotic City."[111] That song carries the lyrics: "If we cannot make babies maybe we can make some time...fuck so pretty you and me, erotic city come alive."[112] The case differs from the previously described actions in that: (1) it involves a commercially distributed song; and (2) it involves usage of one of the "seven dirty words" --namely "fuck."[113]

WXRK-FM, New York also received an October 26th letter from the FCC.[114] The complaint focused on broadcasts by Howard Stern on Infinity[115] stations WXRK-FM, WYSP-FM, Philadelphia, and WJFK-FM, Washington, D.C. in 1988.[116] In part, one of broadcasts aired contained this sexual material:

> I want to rub my ear and have this girl go wild for me...When we come back from commercial, we have a young man who wants to play the piano with his, uh, wiener...Howard, I'd better go into the other room and, uh, get it ready. I'll come in swinging it. It's bigger than yours. I've got a rubber. Don't worry about it. And I've got a second rubber for encore. He's going to wear a contraceptive. I do safe organisms...orgasims. I'm going to play Casio...I believe we hit two keys at the same time. You'd better give me the next segment, though. I'm going to get it going. O.K.? Go in the other room and do whatever you have to do to play it.[117]

The complaint against Diamond Broadcasting's Paris, Arkansas stations KCCL(AM/FM) was different from the other October 26 complaint letters in that it involved what was apparently unplanned programming.[118] According to the letter a phone conversation between General Manager Gene Williams and his son was broadcast live at 7:00 p.m. on January 7, 1988:

> ...Mr. William's son allegedly stated, "To all you listeners in Paris, Arkansas, don't bend over in front of my dad. Gene Williams will fuck you in the ass," at which point the phone was unplugged by another station employee. Mr. Williams apparently phone his son back and over the air stated, "You fucking asshole, I told you we were on the air," to which his son replied, "I don't give a damn." This conversation contained material which, when broadcast, may have violated 18 U.S.C. Section 1464.[119]

KFI-AM, a Los Angeles station, also received an October 26, 1989 letter about material broadcast during Tom Leykis' 11-3 shift on November 12, 1988 and January 6, 1989:

> Female Caller: I'm a breeder-exhibitor of very large dogs and I have five beautiful dogs and my male, sometimes when I groom him, I'll masturbate him and he's just o big and sweet and he really likes it. It's really weird, I know. I could never tell anybody.
>
> Tom Leykis: Oh boy, now, now wait a minute. You masturbate just one dog or do you do this with more than one?
>
> Female Caller: Just the male. I have a big champion male and he's just beautiful and you know, I'll pet him and I don't know, he really likes it.
>
> * * * *
>
> Tom Leykis: Now, do you enjoy masturbating your dog?
>
> Female Caller: Well, I do because it's, he likes it, I mean, you should see the expression on his face.[120]

Following the FCC action, Leykis blasted the "witch hunt" as hypocritical: "The (conservatives) say they want government off the backs of multimillion dollar corporations who buy up radio stations, but when it comes to program content, they want government right down there in our shorts."[121]

Yet another of the October 26 letters went to WWWE-AM, Cleveland about the Gary Dee Show and a 2 p.m. broadcast on June 15, 1989:

> Caller: My comment is Lou told me that Chris James gives fellatio okay. Now my dream, ya still there, Gary?
>
> Gary Dee: Yeah.
>
> Caller: Now, my dream is to get in Chris James' pants.
>
> Gary Dee: Well, why don't you be a man and go down there and say that to her face. You know, you are just like a little kid masturbating in public. You've got no class, you've got no taste.[122]

The final October 26 letter went to KSD-FM, St. Louis and licensee Pacific and Southern.[123] Excerpts from an October 1987 Playboy were said to have been aired at 6:50 a.m. on September 27, 1987.[124]

The November 30 WLUP(AM) Letter. After WLUP(AM) responded October 10, 1989 to the FCC that the "Steve and Gary Show" was not indecent in the view of Evergreen Media, the Commission issued a notice of forfeiture.[125] The station had claimed that the show was "extemporaneous, open forum, frank, live and spontaneous, often humorous, with over half the dialogue supplied by listeners subjected to WLUP's reasonable seven-second screenings..."[126] The station further argued that the program is aimed at adults, and there is no evidence that children listen.[127] The station argued FCC action would create a chilling effect, and that listeners in Chicago did not find the show patently offensive.[128] The FCC responded that talk about homosexual activity, child pornography and oral-genital contact are indecent:

> We believe that all the subject broadcasts fit squarely within our definition of indecency quoted above. The March 30, 1989, "straightforward description" of sexual activities that appeared in the magazine (the sale of which could very well have been restricted as to minors) was delivered by the talkshow host in explicit, graphic and vulgar language, at a time of day when unsupervised children were likely to have been in the listening audience. We do not accept your argument that the broadcast's asserted value as political and social commentary should shield it from normal Commission scrutiny or place it in a special category less vulnerable to Commission sanction. We also believe that the innuendo of that broadcast, as well as the innuendo and double entendre in the two others, was understandable and clearly capable of a specific sexual meaning, the import of which was inescapable.[129]

WLUP(AM), thus, faced a $ 6,000 fine.[130] But the FCC has yet to clarify its degrees of difference between a $ 2,000, $ 6,000 or $ 10,000 fine in indecency cases.

Future Proposals: Is there a way out?

The industry has been highly critical of the Commission's latest attempts to restrict indecent language, but it has been unwilling to advance useful alternatives.

The trade magazine Broadcasting found that the FCC was waving a red flag in a "prurient pursuit" when it should have been dealing with more serious industry issues.[131] The NAB argues that the flat ban, as proposed, is unconstitutional.[132] And the RTNDA has viewed the proposed ban as a first amendment issue by preventing "the occasional use of news subjects' `dirty' language in late evening newscasts, documentaries, interviews, and talk and `magazine' shows."[133]

Meanwhile, the U.S. Court of Appeals, District of Columbia Circuit, seems to find the proposed ban as in conflict with that court's last ruling.[134] And, the FCC is left struggling with a lack of evidence to support effectiveness of either a channeling approach or total ban.[135] Overall, the FCC's historic tradition of inaction is dramatic.

The FCC Record of Inaction

In one of the earliest cases, the FCC found that WUHY-FM had erred in the broadcast of a taped interview containing words such as "shit" and "fuck," but--despite evidence that teens were in the audience--the fine was just $ 100.[136] In a dissent by Commissioner Kenneth A. Cox to even this action, the fear of broadcaster timidity in reaction to the FCC action was expressed:

> WUHY received no complaints about the broadcast here in question, nor did the Commission. However, we had received earlier complaints about the 10 to 11 p.m. time period and were monitoring the station on the night of January 4, 1970. So far as I can tell you, my colleagues are the only people who have encountered this program who are greatly disturbed by it.[137]

Under the rule, the Commission argued for a $ 2,000 fine in cases where violations were repeated or willful.[138] But in the 1973 WGLD-FM "topless" radio case, that higher level of fine was justified only because the interviewer could have moderated "his handling of the subject matter so as to conform to the basic statutory standards."[139] It was not made clear how discussion of oral sex as a method to keep one's sex life alive could have been moderated, but the dissent of Commissioner Nicholas Johnson called for broadcaster discretion.[140] Johnson identified the inherent problem of treating indecent language as obscenity: "The majority admits that `indecent' expression is something less than obscenity, yet the majority nevertheless asserts that it may outlaw indecent expression."[141] Johnson said the definition for obscenity is vague, and "if obscenity is so vaguely defined, then the `indecency' variant promulgated by the majority is a hopeless blur."[142] Johnson refused to participate in a closed-door review of monitoring tapes, and he said the Commission in doing so was acting as a "Big Brother" programming review board "allegedly capable of deciding what is and is not good for the American people to see and hear."[143]

When Sonderling Broadcasting paid its $ 2,000 fine in 1973, the station denied liability.[144] The Commission stood by its view that by replacing a general indecency definition of "utterly without redeeming social value," to the more narrow Miller language, the FCC was on safe legal footing.[145] The federal court in the Illinois Citizens Committee case upheld the FCC fine under the view that the program was obscene, not indecent.[146]

In the Yale Broadcasting case the FCC never prohibited drug-oriented language; the Commission only required stations to monitor their broadcasts.[147]

In the Commission's 1975 report, the FCC continued to tread carefully. It was only Commissioner Charlotte T. Reid, in a concurrence, who argued the position which is alive today:

> While I am particularly shocked that such language was broadcast at a time when children could be expected to be in the audience, I feel constrained to point out that I believe this language to be totally inappropriate for broadcast at any time. In this sense, I think that the Commission's standards do not go far enough. To me, the language used in this case has absolutely no place on the air whether it be 2:00 p.m. or 2:00 a.m.[148]

Such a high point in support of regulation might be seen in the action against University of Pennsylvania station WXPN(FM) if it were not for the ultimate finding that it was licensee failure to supervise, and not the language itself, that was of the greatest concern.[149] The 1975 broadcasts noted by the FCC used terms such as "fucker" "pussy" and "ass," but the FCC seemed most struck by a telephone caller who said he was three years old.[150] Even here, however, the initial $2,000 fine was for indecent and obscene broadcasts.[151]

By the time of the Infinity case in 1987, the Commission was of the view that "indecent" language is broader than the Carlin seven dirty words, including talk of the penis and animal sex.[152]

Language in ACT I has been employed which supports the view against a total ban.[153] Ultimately, the problem could--through the Supreme Court or lower court interpretation--lead to change in interpretation of Pacifica[154]. Thus, the present situation makes generalization difficult.

Reconsideration of the Research Questions

It does not appear that new meaningful principles emerged following the Pacifica decision that serve to guide the FCC in its indecency actions. The Commission's recent cases parallel the cases of the early 1970s.[155]

A coherent policy might have indecent language as permissible on the broadcast airwaves, but it would continue the ban on obscenity to square the content regulation with broader law and eliminate debate over time-of-day issues.

No known social values can be shown which support the need to keep children away from indecent language. It is a different situation from obscenity where behavioral research might suggest danger of negative modeling effects.[156] No such evidence exists in the case of indecent language. And beyond the strict legal problem, The Commission's reliance upon the good faith judgment of licensees to police their own airwaves can be questioned.[157] Where complaints surface, the FCC is generally reluctant to step in and enforce with a heavy hand or move to revoke a valuable license, even in the face of a difficult political climate.[158]

Toward a Research Model

The Commission has shown no interest in employing systematic methods of content analysis which might serve to define what it is about content that is objectionable.[159] However, when one makes even a cursory review of media content during this period which was determined by the same FCC to not be indecent, it becomes apparent that researchers need to dig deeper.[160] In one such case, a "joke" about John Tower made reference to "battery operated pieces of plastic jewelry for those hard to reach areas."[161]

Most of the present material in the indecency controversy does not deal with the Carlin words; and categorizing innuendo would seem to be a rather subjective regulatory process.[162] Because the FCC has not made clear decision-reasoning, a content study might be one way to get at it.

Social theory on sex-role stereotyping,[163] gender culture[164] and analysis of dominance in media content[165] might provide the researcher with insight on key variables which define "indecency."[166] It may well be that contextual differences--such as those first found by Jassem and Glasser[167]--result when sexual references occur within the framework of other objectionable descriptions.

Notes

1. See Paul D. Driscoll, "The Federal Communications Commission and Broadcast Indecency," Law Division, Association for Education in Journalism and Mass Communication, April 1989. Cf. Theodore L. Glasser, "The Press, Privacy, and Community Mores," Mass Communication Division, Speech Communication Association, Louisville, Kentucky, November 1982; and Matthew L. Spitzer, "Controlling the Content of Print and Broadcasting," 58 S. Cal. L. Rev. 1349 (1985), Seven Dirty Words and Six Other Stories, Controlling the Content of Print and Broadcast, New Haven: Yale University Press, 1986. Cf. Timothy B. Dyk, Book Review, 40(1) Federal Com. L.J. 131-41 (1988).

2. Infra., note 91.

3. See T. Barton Carter, Marc A. Franklin and Jay B. Wright, The First Amendment and the Fifth Estate, Regulation of Electronic Mass Media, Second Edition, Westbury, NY: The Foundation Press, 1989, pp. 276-345.

4. See Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir. 1973).

5. Roth v. United States, 354 U.S. 476 (1957).

6. Miller v. California, 413 U.S. 15 (1973). The case establishes a contemporary community standards test for review of patently offensive sexual material that lacks social value in determining unprotected "obscenity."

7. Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978).

8. Id.

9. 47 U.S.C., Sections 312 and 503.

10. 18 U.S.C. 1464.

11. Pacifica, fn. 13: "the validity of civil sanctions is not linked to the validity of the criminal penalty."

12. Pacifica Foundation, 36 FCC 147 (1964).

13. In Re WUHY-FM Eastern Educational Radio, 24 FCC 2d 408 (1970).

14. See In Re Apparent Liability, WGLD-FM, 41 F.C.C. 2d 919 (1973); and Sonderling, 41 F.C.C. 2d 777 (1973).

15. Illinois Citizens Committee for Broadcasting v. FCC, 515 F. 2d 397 (D.C. Cir. 1974).

16. Id.

17. Supra, note 7.

18. For a discussion how such enforcement based on political factors may result in failed policy, see Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, The Politics of Broadcast Regulation, 3rd edition, New York: St. Martin's Press, 1982. For more on the general regulatory problem, see Michael Starr and David Atkin, "The Department of Communications: A Plan for the Abolition of the Federal Communications Commission, Radio-Television Journalism Division, Association for Education in Journalism and Mass Communication, national conference, Washington, D.C., August 1989. For a sense of the political climate on indecency, one only need read the comments of Sen. Thermond: "It is readily apparent that through thinly veiled innuendo or with unbridled candor, sexually explicit material is growing by leaps and bounds...," 135 Cong. Rec. S. 12928 (Sept. 18, 1989).

19. Infinity Broadcasting, 2 FCC Rcd. 2705 (1987). Howard Stern, the most well-known of shock jocks, was cited for talking about "testicles," "homos," "lesbians" and "sodomy." Stern's dialogue avoids Pacifica Carlin monologue words.

20. Supra, note 7.

21. Senator Albert Gore (D-Tennessee) challenged the nomination of Commissioner Andrew C. Barrett, who had said "the FCC must recognize `there is a market for indecency' and the agency's role is to decide `what the law will allow us to tolerate.' Americans, Mr. Gore responded, are `sick and tired of what's going on.'" Quoted at, 135 Cong. Rec. S. 10384, *S10386.

22. See Action for Children's Television v. FCC, 852 F. 2d 1332, 1340 (D.C. Cir. 1988).

23. While such an argument may make sense when the content at-issue is pornography or obscenity, it does not follow that indecent content results in harm.

24. Howard M. Kleiman, "Indecent Programming on Cable Television: Legal and Social Dimensions," Journal of Broadcasting & Electronic Media, 30(3):275-94 (Summer 1986).

25. Supra, note 22.

26. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969); NBC v. United States, 319 U.S. 190 (1943).

27. Jeremy Harris Lipschultz, "'Political Propaganda': The Supreme Court Decision in Meese v. Keene," Communication and the Law, 11(4):25-44 (December 1989).

28. Id.

29. Id.

30. Supra, note 6.

31. Supra, note 3.

32. Miller.

33. Infra, note 91.

34. Id.

35. 438 U.S. 730.

36. 438 U.S. 729-30.

37. 438 U.S. 730.

38. Id.

39. Cf. Telecommunications Research and Action Center v. FCC, 800 F.2d 1181 (D.C. Cir. 1986), for the recent view that technical or physical scarcity no longer justifies regulation of the broadcast medium, or treating it differently from the printed press in terms of the first amendment.

40. 438 U.S. 731.

41. Supra, note 22.

42. No criminal prosecutions by the Justice Department, under Section 1464, have been reported in the literature.

43. A 24-hour-ban, as an absolute prohibition, could be reasoned to be "censorship" not narrowly crafted. See the test of United States v. O'Brien, 391 U.S. 367 (1968). A governmental restriction should be "no greater than essential" to further a substantial interest. The FCC continued efforts in 1990 to build a record of evidence around times of day when children are present in the audience.

44. 438 U.S. 743, fn. 18 (Opinion of Stevens, J.)

45. 438 U.S. 770 (Brennan, J. dissenting)

46. 438 U.S. 773 (Brennan, J. dissenting)

47. Supra, note 3, p. 305.

48. Supra, note 19.

49. Supra, note 22.

50. New Indecency Enforcement Standards, 2 F.C.C. Rcd. 2726 (1987). The Commission broadened its approach, moving away from the Carlin words to a "generic" approach in the definition of broadcast indecency: "Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." The FCC also found reasonable risk that children would be in the audience after 10 p.m., the previously protected time. Cf. Pacifica Foundation, 2 F.C.C. Rcd. 2698 (1987); and Regents of the University of California, 2 F.C.C. Rcd. 2703 (1987).

51. In the Matter of Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Sec. 1464, Order, FCC 88-416 (Dec. 19, 1988). Also see 53(249) FR 52425 (Dec. 28, 1988).

52. Id., cf. note 18.

53. F.C.C. 88-416, point number 3.

54. Id.

55. Id.

56. Id.

57. Id.

58. Separate Statement of Commissioner Patricia Diaz Dennis (Dec. 12, 1989).

59. Id.

60. Id.

61. Id.

62. Sable Communications v. FCC, ___ U.S. ___, 109 S.Ct. 2829, 106 L.Ed. 2d 93, 57 U.S.L.W. 492, 16 Med.L.Rpt. 1961 (June 20, 1989).

63. Id.

64. Id.

65. Id.

66. Id.

67. Id.

68. Id.

69. Id.

70. Id.

71. Id.

72. Id.

73. Id.

74. Id.

75. 413 U.S. 49, 103 (1973).

76. Sable.

77. Action for Children's Television.

78. Sen. Thermond: "It is readily apparent that through thinly veiled innuendo or with unbridled candor, sexually explicit material is growing by leaps and bounds on network television," 135 Cong. Rec. S. 12928; Sen. DeConcini: "These materials are not reserved for adults, who may have developed a sense of self regulation, but are viewed at prime time when impressionable children are most likely to be in front of the set," Id.; Sen. Gore: "We have seen an alarming trend in radio and television away from standards and toward more and more violent, explicit programming content during family viewing and listening hours," 135 Cong. Rec. S. 10384. Commission nominee Andrew Barrett also caused controversy during this period when he was quoted as saying, "there is a market for indecency." In a letter to the Senate later, he wrote: "I personally abhor the indecency and obscenity that pervades our society today. There is no question that preventing obscene and indecent broadcasts is a critical function of the FCC. The spectrum is a scarce resource, and the FCC has the obligation to ensure that those individuals granted a privilege to broadcast over the spectrum set the highest standards for decency," at 135 Cong. Rec. S. 10384.

79. Cox News Service, Jan. 29, 1989.

80. Jerry Kirk, founder and president, National Coalition Against Pornography, Los Angeles Times Service, Feb. 12, 1989.

81. Al Goldstein, publisher, Screw magazine, Los Angeles Times Service, Feb. 12, 1989.

82. The process has been driven by complaints made to the FCC about various licensees.

83. The FCC continued to allow indecent language in the overnight hours pending review of the 24-hour ban plan.

84. Broadcasting, "FCC cleans out the pipeline on indecency," Oct. 30, 1989, p. 28.

85. Id.

86. Id.

87. Id.

88. Broadcasting, "Radio broadcasters troubled by Sikes FCC 'moving the goal posts' on indecency," Nov. 6, 1989, pp. 66-67. One broadcaster said, "I don't know how any group in Washington can set themselves up as defining community standards in each market in the nation."

89. The information was obtained through a Freedom of Information Act (5 U.S.C. Section 552) request under FOIA Control No. 89-217, in a packet dated February 8, 1990. A request to obtain copies of station response letters is pending in a request letter dated March 9, 1990. For background on the problems with FOIA requests to the FCC, see Media Access Project, 41 F.C.C. 2d 179 (1973), and In the Matter of Rob Warden, 70 F.C.C. 2d 1735 (1978).

90. FCC letter, 8310-TRW, August 24, 1989.

91. 18 U.S.C. 1464 reads: "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $ 10,000 or imprisoned not more than two years, or both." The Commission cites the language of 47 U.S.C. Sections 312(a)(6), and 503(b)(1)(D) as its statutory authority. to punish licensees. The Section 312 provisions allow the FCC to "revoke any station license or construction permit" for lottery (Section 1304), fraud (Section 1343) or indecency (Section 1464) reasons. Section 503 provides for "forfeitures"--fines--for violations. Enforcement of Section 1464 in terms of a criminal penalty would be a matter for the Justice Department, but no known cases exist.

92. Supra, note 90. The FCC uses as its authority: FCC v. Pacifica Foundation, 438 U.S. 726 (1978); Pacifica Foundation, Inc., 2 F.C.C. Rcd 2698 (1987); The Regents of the University of California, 2 F.C.C. Rcd 2703 (1987), and Infinity Broadcasting Corp. of Pa., 2 F.C.C. Rcd 2705 (1987), order on reconsideration, Infinity Broadcasting Corp., 3 F.C.C. Rcd 930 (1987) ("Reconsideration Order"), aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988)("ACT I"). The "ACT I" decision was treated as "governing law" by the FCC while review on the 24-hour-ban continued.

93. 8310-TRW, August 24, 1989 letter to Evergreen Media, pp. 3-4.

94. Id.

95. 8310-TRW, August 24, 1989 letter to Narragansett Broadcasting.

96. Id., pp. 3-6.

97. Id.

98. 8310-TRW, August 24, 1989 letter to Great America TV and Radio.

99. United Press International, Nov. 19, 1987. The quarter-page advertisement was titled "Clean Air," according to the report. The station began using a delay system trombone sounds to hide "potentially offensive comments from callers and studio guests." The station manager was quoted as saying, "We want ratings, not trouble."

100. Supra, note 98. Great America had taken over the station from Taft Broadcasting of Cincinnati. DIB had asked the FCC to fine WFBQ as much as $ 2,000 per day in June 1987. The Butch Beer spots had also been broadcast by other stations.

101. 8310-TRW, January 17, 1990 letter to Great America TV and Radio.

102. Id., at 1.

103. 8310-MD, C10-01, October 26, 1989 letter to Cox Broadcasting Division, Executive Vice-President for Radio, Michael J. Faherty.

104. Id., at 1.

105. Id., at 3.

106. Id.

107. Id., pp. 5-9.

108. Crain Communications, Electronic Media (Nexis), Oct. 30, 1989: "Songs like the `Penis Envy Song' and `Walk with an Erection' should not be tolerated on public airwaves."

109. Supra, note 103.

110. 8310-MD, October 26, 1989 letter to Guy Gannett Publishing.

111. 8310-MD, October 26, 1989 letter to Nationwide Communications.

112. Id., at 3.

113. Id.

114. 8310-TRW, October 26, 1989 letter to Infinity Broadcasting.

115. Id., at 1. As early as 1984, Stern was featured in a national magazine article titled "New York's mad-dog deejay may be mouth of the '80s; he's leader of the pack that's made radio raunchy," Time, Inc., People (Nexis), Oct. 22, 1984, p. 110. He said, "all radio station managements are the same -- they're whores and slobs. The day I don't have ratings is the day I can kiss my ass goodbye." Stern was just 28-years-old when his program was aired in 1982 on WNBC, New York, following ratings success in a smaller market.

116. Supra, note 114.

117. Id., at 3.

118. 8310-EJS, October 26, 1989 letter to Diamond State Broadcasting.

119. Id., at 1.

120. 8310-MD, October 26, 1989 letter to KFI, Inc.

121. Los Angeles Times, Oct. 28, 1989, F1.

122. 8310-TRW, October 26, 1989 letter to Independent Group Limited Partnership.

123. 8310-TRW, October 26, 1989 letter to Pacific and Southern Company.

124. Id., at 3.

125. 8310-MD, November 30, 1989 letter to Evergreen Media.

126. Id., at 1.

127. Id.

128. Id., at 2.

129. Id.

130. Id., at 3.

131. Broadcasting, editorial, "Bad to worse," Oct. 30, 1989.

132. National Association of Broadcasters, TV Today, Feb. 26, 1990.

133. Radio-Television News Directors Association, "RTNDA Joins Appeal for Review of Indecency Rule," Intercom, 6(2):2 (Jan. 19, 1989).

134. Broadcasting, "Chances slim for 24-hour FCC ban on indecency," Jan. 30, 1989.

135. Broadcasting, Law and Regulation column, "FCC hears little support for 24-hour broadcasting indecency ban," Feb. 26, 1990. Reply comment time was extended by the FCC to March 20, 1990, 55 FR 2236 (Jan. 23, 1990).

136. 24 F.C.C. 2d 408 (1970).

137. Id.

138. 41 F.C.C. 2d 919 (1973).

139. Id.

140. Id.

141. Id.

142. Id.

143. Id.

144. 41 F.C.C. 2d 777 (1973).

145. Id.

146. 515 F.2d 397 (1975).

147. 478 F.2d594 (1973).

148. 51 F.C.C. 2d 418 (1975).

149. 57 F.C.C. 2d 782 (1975).

150. Id.

151. Id.

152. 2 F.C.C. Rcd. 2705 (1987).

153. 852 F.2d 1332, 1340 (D.C. Cir. 1988): "Indecent but not obscene material, we reiterate, qualifies for first amendment protection whether or not it has serious merit."

154. Id., at 1344, fn. 21: "Petitioners argue cogently parental authority is enhanced, not reduced if government permits programming at hours outside the workday hours common in the community, when most parents can supervise their children's listening."

155. In Infinity the Commission found "untenable the view that the holding in Pacifica limits a finding of indecency to the use of the seven offensive words contained in the Carlin monologue." It is notable that popular media complaints about Howard Stern date to at least 1984, as evidenced by a People magazine piece of that year. It is not clear that Pacifica caused a lull in indecency actions against stations; it may have been FCC reluctance to enforce the rules until the Commission began to feel political pressure from the Congress.

156. See, for example, Paul Messaris and Dennis Kerr, "TV-Related Mother-Child Interaction and Children's Perceptions of TV Characters," Journalism Quarterly, 61(3):662-66 (Autumn 1984): In the case of televised aggression and family environment, "information on the consequences of such behavior is still lacking." It is unclear how indecent language, presumably more subtle than violence or obscenity, can have a negative effect on cognitive or affective development.

157. FCC Chair Alfred Sikes, speaking to the National Association of Broadcasters said, "a broadcast industry whose standards are no higher than its lowest common denominator not only ill-serves our nation; it also risks arousing an already too-cynical public, and inviting governmental intrusion, 1990 FCC LEXIS 1720, April 3, 1990. In May, he told the Economic Club of Detroit: "A society whose commitment to individual freedom traces back to Judeo-Christian ethics will not, I think, acquiesce to the notion of unrestrained license, un accompanied by a sense of social responsibility," 1990 FCC LEXIS 2574, May 7, 1990.

158. See KING-TV, FCC 90-104, 1990 FCC LEXIS 2414, May 10, 1990. The FCC upheld a decision by the Mass Media Bureau to dismiss a complaint about the broadcast of "Teen Sex, What About the Kids?" at 9 p.m. on June 3, 1987. The program was in a series on teen problems. At issue was a segment on high school sex education: "The program included candid discussions of sexual topics such as teen pregnancy and sexually transmitted diseases, and used sex organ models to stimulate the use of various birth control devices, i.e., prophylactics and diaphrams." The Commission finding was that, "Although the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner or in any way that we would consider patently offensive," 1990 FCC LEXIS 2414.

159. Quantitative, systematic content coding is concerned with both reliability and validity of the categorizations.

160. A set of audio tapes of dismissed radio content can be obtained from an independent contractor.

161. Id, the 7 a.m. broadcast was from the KZFM morning show.

162. The only stated criteria appears to be "pandering" in the sense that sexual discussion which is not "clinical or instructional" may be indecent. But the FCC does not reveal, and may not even know, its operational variables.

163. See Lea P. Stewart, Alan D. Stewart, Sheryl A. Friendly and Pamela J. Cooper, Communication Between the Sexes, Sex differences and sex-role stereotypes, Second Edition, Scottsdale, AZ: Gorsuch Scarisbrick, 1990, pp. 208-9: "research demonstrates that the images presented in media do affect the sex roles men and women consider appropriate."

164. Mary Ellen Brown, "Soap Opera and Women's Culture: Politics and the Popular," in Doing Research on Women's Communication, Perspectives on Theory and Method, Kathryn Carter and Carole Spitzack, eds., Norwood, NJ: Ablex, 1989. Cf. Klaus Bruhn Jensen, "Television Futures: A Social Action Methodology for Studying Interpretive Communities," Critical Studies In Mass Communication, 7(2):129-46, 139 (June 1990). Culture seems to affect interpretation. In one study, an older group raised criticisms about sexual and violent content on television while others did not.

165. Gretchen S. Barbatis, Martin R. Wong and Gregory Herek, "A Struggle for Dominance: Relational Communication Patterns in Television Drama," Communication Quarterly 31(2):148-55 (Spring 1983). Message characteristics can be coded for dominance and submission. Also see Ronald Berman, Advertising and Social Change, Beverly Hills: Sage, 1981, at p. 54 on how media, in this case advertising, can be seen as "an instrument of `power and repression'." A useful analysis of the broadcast indecency content would be to see if it fits with Berman's view of gender issues in advertising: "It suggests that women are infantile and to some degree autoerotic or capable of finding satisfaction principally through the embrace of commodities." One working hypothesis would be that the male-dominated radio content treats women in negative, stereotypical forms.

166. Harvey Jassem and Theodore L. Glasser, "Children, Indecency and the Perils of Broadcasting: The `Scared Straight' Case," Journalism Quarterly 60(3):509-12 (Autumn 1983). The broadcast contained Carlin words, but apparently was not found to be pandering. Jassem and Glasser, however, saw the content as similar to that which led to the Pacifica ruling saying the case "only serves to underscore the FCC's arbitrary and capricious enforcement of the statutory ban on obscene, indecent and profane broadcasts."

INVASION OF PRIVACY: A Q-STUDY OF THE ORIENTATIONS OF MEDIA, OFFICIALS AND THE PUBLIC*

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ABSTRACT

Invasion of privacy--the right to be left alone--is a legal concept attracting much popular interest. Legal theory has advanced without benefit of empirical verification of assumptions about public perceptions.

The present Q-study compared the orientations of members of the news media, public officials and the general public. A model was employed considering type of invasion--media versus non-media--conducted, and type of target, public or non-public.

Most of the theoretical variance was accounted for in the non-media invasions where all three groups reflected similar patterns of not seeing invasion when the target was public, and being concerned when the target was not. When the invasion was by media and the target was public, media and officials were in the greatest disagreement; when the invasion was by media and the target was non-public, it was media and the public that were in the greatest disagreement.

The private home, medical records and sexual conduct were viewed as areas most in need of privacy protection. Media and officials were more sensitive to political privacy concerns than the general public.

Data support the need for a reconceptualization of the legal concept of invasion of privacy which takes into account social norms.

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"Invasion of Privacy: A Q-study of the Orientations of Media, Officials and the Public"

Invasion of privacy[1]--the right to be let alone[2]--is a concept that has come under increasing scrutiny in recent years by scholars, the legal community, the press and the public. The tort of invasion of privacy has been historically categorized for legal purposes with four prongs under two main headings: intrusion of the plaintiff's physical solitude covers one broad area; and invasion of privacy by publication covers the other and includes putting the plaintiff in a false light, publication of embarrassing private facts and appropriation.[3]

Invasion of privacy often is thought to involve the trespass into one's private "zone" or private place.[4] A number of cases have arisen over the years that have helped to muddy the legal waters. The false light prong of privacy now seems difficult to separate from defamation actions;[5] the embarrassing private facts prong is softened by the media defense of newsworthiness;[6] media intrusion appears difficult to separate from the physical trespass it so closely parallels;[7] and appropriation of one's likeness for commercial, financial gain hardly appears to belong within a concept traditionally linked to human dignity.[8] It has been argued that the legal concept has not proved to be valuable and should be abandoned.[9] But much of the debate about privacy has proceeded without benefit of empirical knowledge about the public view of this concept.

This paper will trace the conceptual roots of invasion of privacy; it will test public views within a structured paradigm; and it will raise theoretical questions about the redefinition of the concept.

Historical Views of Privacy

Most writers trace "the right to privacy" to the December 15, 1890 Harvard Law Review piece of the same title.[10] Samuel D. Warren and Louis D. Brandeis argued for new rights in the common law beyond property and person: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."[11] Drawing upon the right "to be let alone,"[12] the authors were concerned about "the sacred precincts of private and domestic life,"[13] and "the evil of the invasion of privacy by the newspapers."[14]

Of particular concern was the role that modern photography might play in diluting privacy. For example, the authors cited the case of a New York show girl whose picture was taken "surreptitiously and without her consent"[15]--as reported in the New York Times, she obtained an injunction "restraining Benjamin D. Stevens, the manager of `Castles in the Air' company ... and Harry Myers, a photographer, from making use of the flash-light photograph they surreptitiously ... took of her the other evening while she was on the stage in tights."[16] In the view of Warren and Brandeis, the technological progress was outpacing legal protection:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[17]

Still, a matter of "public or general interest," a fact disclosed in public meeting, oral communications, and those published with consent, would not give rise to privacy actions in the traditional view.[18] Warren and Brandeis recognized the common law principle that one's home is a castle, and asked: "Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?"[19]

It was not until August 1960 that William L. Prosser's California Law Review article further developed the original ideas.[20] Prosser said the 1890 article came within the context of Boston newspaper coverage of social elite "parties in highly personal and embarrassing detail."[21] Prosser updated the argument for a right to privacy by noting that many state courts by 1960 recognized it.[22] What

Prosser did was to review the more than 300 cases he found "in the books" in 1960 and concluded that:

> What has emerged from the decisions is no simple matter. It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley,() `to be let alone.'[23]

Prosser refused to apply "exact definition" and merely described the torts; it is these descriptions that survive in the legal analysis today. While the categorization scheme implies separate torts, it is possible for overlap, as in Prosser's example where, "the defendant breaks into the plaintiff's home, steals his photograph, and publishes it with false statements about the plaintiff in his advertising."[24] The Prosser model assumes that public figures and matters of public interest, however, are distinct for purposes of legal action.

Noticeably absent from the legal development of the concept of privacy, is formal measurement of public sentiment. Prosser treats the language of state statutes "(a)s some evidence of popular feeling."[25]

> This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.[26]

One of the goals of the present research is to build upon some of the more recent social research on public perceptions about privacy; in doing so it is hoped that data will lead to empirical generalizations worthy of theoretical development. The law, it is argued, should not be devoid of considerations about the human condition.[27] And, where human behavior is involved, it is always possible to quantify it, and it is also possible to study it in a systematic manner.[28] By better understanding conceptualizations of privacy, it ought to be possible to better understand the value of the legal constructions in terms of their validity.

Recent Developments

Emerson[29] comprehensively reviewed definitions of privacy, and he distinguishes between the broad views of Bloustein[30] and Konvitz[31], and the more narrow scope of Westin.[32] At-issue is whether privacy should be viewed as merely a matter of "human dignity" or "sphere of space" or as a "claim" to personal information. Emerson suggested that privacy is related to individualism:

> Generally speaking, the concept of a right to privacy attempts to a draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community.[33]

Thus, privacy is seen as functional psychologically by affording the individual time for purposes of self-definition, review and emotional release.[34] It has been generally assumed by scholars that we live in a techno-complex world that makes privacy more difficult, although this would appear to be an empirical question. The law has attempted to distinguish between invasions of privacy by government and those of private entities.[35] Yet it is unclear why the nature of the invasion should make a difference if, as Emerson puts it, the right of privacy boils-down to "the right to shut out the community."[36]

Emerson's review of the case law in the area of invasion of privacy leads to unsatisfying results. He found that "newsworthiness" fails to work as a balance of First Amendment rights against privacy rights: "From a privacy point of view, the more newsworthy, the greater the invasion of privacy."[37] In an attempt to "create legal doctrine" that goes beyond case-by-case "balance" of privacy and free expression rights, Emerson ultimately protects the first amendment broadly, limiting privacy rights to embarrassing facts and fictionalization: "Any individual living among others is, by the very nature of society, subject to an enormous amount of comment, gossip, criticism and the like."[38]

Privacy, conceptually, is difficult because alone it makes great sense, but when contrasted with the basic press freedoms quickly becomes problematic. Pember called it a "basic philosophical problem" facing the courts:

> Which is more important, the protection given to society by a free and unfettered press, or the peace of mind given the individual by rigid protection of the right to privacy?[39]

One must distinguish, it would seem, between privacy invasion related to actual publication of a news story and that which results from "emotional distress" in "outrageous conduct" of newsgathering.[40] It could be argued that the press freedom to publish outweighs nearly all privacy rights, but newsgathering activities do not always carry constitutional virtues.

McLean argues that press and privacy rights are "compatible" in the Meiklejohn view.[41] The basic idea is to distinguish public and nonpublic discussion by giving absolute protection to public discussion and qualified protection to nonpublic discussion, all in the name of promotion of self-government.[42] It is difficult, however, to read broadly the fifth amendment protections as serving to solve the privacy quagmire.

Left with the first amendment protections and the tort of invasion of privacy, academic debate over the value of the tort has continued. Smith argued that the tort has no place in today's world:

> It seemed like a good idea at the time it was introduced into tort law, a concept filled with great promise for soothing abrasions caused by friction between the sensibilities of many citizens and the probings of a press becoming more pervasive through industrialization. But its development has been so uneven and its performance so unsatisfactory that, if torts had tear ducts, it might weep that it was ever born.[43]

The right to privacy appears to rest upon the question of psychological strength of individuals and institutional strength of the press, and the degree to which government through the courts should intervene to provide degrees of protection. Miller sees the modern world as that of an increasingly strong press and an increasingly helpless individual:

> We live in a crowded, complex world, one in which a host of decisions affecting our daily lives--whether we are insurable, credit-worthy, employable or eligible for government benefits--are made by people we never see, using information over which we have no control. The individual is increasingly at the mercy of information brokers who covet, collect and abuse personal information on other people.[44]

Miller argues that the press ironically "decry these developments" at the same time as reporters contribute to the problem.[45] Yet, little research has been conducted which attempts to explore the nature of media versus non-media invasions.

Is privacy purely a matter of individual perception? Or, is there a degree of group consensus about the concept? Chafee has been quoted as saying: "I recommend that respect for privacy be left to public opinion and the conscience of owners and editors."[46] Yet, a surprising little is known about public opinion on the social value of privacy.

Social Research: Public Opinion and Privacy

In one of the more developed surveys of public opinion about privacy, Vidmar and Flaherty[47] work from the assumption that new information technologies--such as surveillance cameras and computer information systems--invade personal privacy:

> Threats to our personal privacy as a consequence of these information systems are already apparent. The surveillance capability of police agencies has been enhanced. Businesses buy or trade information about customers for direct mail or telephone solicitations. Government agencies conduct computer matching of welfare, social security, and other lists to detect fraud, an imperfect process resulting in many innocent people being subjected to intensive scrutiny.[48]

Surveys in Canada and the United States found "high levels of concern for privacy."[49]

Relative to other issues, protecting privacy ranked behind inflation, unemployment and crime in the streets; but it ranked ahead of the spread of nuclear weapons, strikes and Canadian relations.[50] Only one percent of the sample felt privacy was not important, while 90 percent found it very important or important.[51]

Compared to other rights, privacy ranked at the top of a list, ahead of free speech, conditions for older people, equal rights for women, minority rights, free press and prison conditions.[52] The sample found most serious invasion of privacy in the examples of: police legal wire taps; medical record examination without consent by insurance companies; police inspection of mail; mailing list selling;

and surveillance of worker behavior by closed circuit television.[53] People appeared to be most sensitive about information about their homes and financial status.[54] Vidmar and Flaherty conclude that: "Our data suggest that concern for privacy is a latent social and political issue that needs only some particularly outstanding incidents to foster its emergence."[55]

Unfortunately, the research does not clearly distinguish public sentiment about invasion of privacy by government agencies, business and the press. Media researchers, more often, turn to clarification of case law: "What constitutes invasion? To what extent does a public figure lose the right of privacy? Does fictionalization constitute false-light? Must the statement be reputation-injuring? What constitutes identification? And what constitutes a defense?"[56] Such analyses, while useful to journalists for establishment of behavioral guidelines, do not provide a basis for theoretical development or deeper understanding of the meaning of invasion of privacy.

Frequently, an event or series of events that lead to large amounts of media coverage which may be perceived as invading privacy in one way or another, produce renewed public discussion about privacy. In recent years the downfall of several public figures do to such media coverage has fostered interest. For example, the sex scandal appears to be a newspaper genre where some would question the depth of details in such content.[57] Much of the coverage is standardized across different media, fueled by new sources, new allegations, pictures, editorials and cartoons.[58]

All of this has led many journalists to consider an apparent credibility gap with the public and media ethics.[59] About one-third of a sample in one media survey said newspapers and television invade people's privacy; about the same number are neutral, and the same number said they do not.[60] The issue came to the forefront in May 1987 when presidential candidate Gary Hart found himself labeled a "womanizer" by a press corps that had previously withheld rumors:

> Hart's relationships with women other than his wife of twenty-eight years had been talked about privately more than written about by Washington reporters--until the (Miami) Herald broke its story.[61]

There appeared to be some public sympathy at the time for Hart's condemnation of reporter technique: "...in bushes, false and inaccurate stories printed, photographers peeking in our windows, swarms of helicopters hovering over our roof, and my very strong wife close to tears because she can't even get in her own house at night without being harassed."[62] But such stories fade quickly from the front pages of newspapers and the tops of newscasts, and with them seems to fade public concern until the next crisis pops up. Then, the press engage their talents, or as some public officials label it, the "vultures" come out again.[63]

Newspaper research in Miami and Hartford independently found that editors faced with a questionable news story, as a group, are more likely to vote to publish than are their readers.[64] Academic research is consistent on the point that media people may not be good at determining what their audiences know, believe or want.[65] When public sensibilities about good taste are offended, the media may be surprised with the level and force of audience response.[66] At the same time, however, some people advanced into the public eye appear to seek the publicity they obtain from the media.[67]

The Impact of Case Law

The press has found great legal latitude to publish, especially where some political debate is involved. Media derive freedoms from the right to speak one's mind; the recognition that, legally, there is no such thing as a false idea; speech may be critical of public officials and figures in the name of robust political debate; and many things done with poor motives are protected by the first amendment.[68]

> "Outrageousness" in the area of political and social discourse, has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.[69]

Thus, the recent sentiment of the Supreme Court has been to shy away from questions of taste. And where the question is one of information gathering, the Supreme Court has been reluctant to prohibit police or government surveillance in the name of privacy, whether the information comes from the air[70] or the garbage can.[71] Yet, the Court has been divided sharply in its decisions.[72] At issue has been the definition of a "reasonable expectation of privacy" and the idea that privacy is diluted when information is in "plain view" of the snoopers.[73]

> A single bag of trash testifies eloquently to the eatings, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the `sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect.[74]

Trash appears to fall within a muddy legal area of information, neither abandoned nor possessed: "Most of us," Justice Brennan dissented, "I believe, would be incensed to discover a meddler--whether a neighbor, a reporter, or a detective--scrutinizing our sealed trash containers to discover some detail of our personal lives.[75]

Privacy and the Home

Historically and traditionally, it is the private residence that is the place most likely to afford individuals a right to privacy. It is a right derived from the English common law:

> The poorest man may in his cottage bid defiance to the Crown. It may be frail--its roof may shake--the wind may enter--but the King of England cannot enter--all his force dares not cross the threshold or the ruined tenement![76]

The individual, however, carries some right from "unwarranted publicity" and "public scrutiny" outside the home,[77] but it is a right not clearly defined. This is partly because privacy is not specifically constitutional, rather, it derives from various rights.[78] Yet, critics charge that the large, complex societies of our time actually afford more privacy than traditional cultures.[79] Though ill-defined and not well understood, the issue of invasion of privacy continues to be vital, yet problematic, for the legal community, public personalities, the media, academic researchers and the public.

The Public and Privacy

Privacy may be a personal value, grounded in one's own personal experiences. It may depend greatly on frame-of-reference. In an unsystematic sampling of opinion,[80] for example, a wide range of examples are volunteered when people are asked to specify various invasions of privacy: reporters interviewing public citizens who have been "repeatedly harassed"; "snooping" through a sibling's diary; television cameras with tape rolling "going wherever they please"; hospitals revealing to the press names of siamese twins; searches and seizures of property by teachers; birth control parental consent laws; illegal job interview questions; "exploiting" personal information; "coming into one's home without consent"; "someone snooping in my papers"; invasion of "personal space" or "domain" or "business"; taking pictures without permission; "telephone harassment"; a "peeping Tom"; listening to private telephone conversations or monitoring someone's leisure time activities; police coming into "my home without a warrant"; private investigators checking into "my background"; mail search; telephone sales; sidewalk preachers; garbage searches; private information about political candidates; and those invasions defined by law.[81]

Clearly, the public goes well beyond behavior of members of the news media in considering privacy invasions. However, non-systematic views fail to distinguish differences the public perceives between media and non-media invasions of public and non-public people.

A Research Model

The present study breaks-down privacy conceptually along two dimensions: (1) type of invader and, (2) type of target. That is, there should be a theoretical difference if the invader is news media or some other type; and there should be a difference if the target of the invasion is a public person or non-public person. The cross-partition is employed to develop statements that fit into one of each of the four cells.

[INSERT FIGURE 1 ABOUT HERE]

The privacy cells will be employed to attempt to distinguish between three groups of respondents: (1) members of the news media; (2) public officials; and (3) members of the general public with no media or government experience.

Previous research has been suggestive of orientational similarities between media and public officials,[82] and of potential gaps between media and their audiences.[83] These empirical generalizations appear to withstand a variety of subject-matter, and invasion of privacy should not be a unique topic.

Research Questions

A series of questions are raised by the above analysis.

1. Are members of the news media different from their audiences in their views about privacy?

2. Are members of the news media different from public officials they cover in their views about privacy?

3. Can privacy be broken-down based upon the nature of the invasion, the type of invader and the type of target?

4. Are public views of privacy fundamentally different from legal norms?

5. Are public views of privacy fundamentally different from historical tradition?

Methodology

The present study employs the coorientation measurement model and Q-methodology to study three groups: news media; officials; and the public.

Coorientation

Coorientation[84] is a useful measurement model to study group similarities and differences in terms of orientations toward various topics. Coorientation provides for measurement of three variables using correlation coefficients to compare any two individuals or groups.[85] Agreement scores reflect magnitude of similarity in the patterns of any set of orientations; accuracy scores reflect the ability of any individual or group to predict the orientations of another; and congruency scores reflect the degree to which any individual or group perceives orientations as similar to the others.[86] The model becomes more complex when three groups of orientations are involved.[87] The present research is limited to the study of agreement between groups, and accuracy and congruency were not measured. Agreement is of primary concern because it is a measure of the similarity of group orientations. Accuracy and congruency are communication-related variables which assume some interpersonal contact. In the present study, members of the general public had "contact" only through the attention paid to media, but some members of the media sample did have interpersonal contact with some members of the public official group sample.

Q-methodology

Q-methodology[88] involves treating individuals as variables and sample statements as observations.[89] For the present study, forty-eight statements were constructed, including twelve to represent each of the four theoretical cells described earlier: media invasion of public people; media invasion of non-public people; non-media invasion of public people; and non-media invasion of non-public people.[90]

The statements were pre-tested and yielded reliability correlation coefficients of between +.42 and +.85, and all were statistically significant at the alpha = .05 level.[91] The statements were retained for use in the study. Statements were scored from one to eleven, corresponding with the eleven piles representing the structured distribution from "not an invasion of privacy" to "a strong invasion of privacy." Each respondent sorted the forty-eight statements once, representing their own orientation as a group member.[92]

[INSERT FIGURE 2 ABOUT HERE]

Analysis of Variance

The statement scores were averaged for each group for each of the four cells in a 2 x 2 x 3 design.[93] Main and interaction effects were tested. Subject, group and statement condition variances were studied.

Other Data

Each respondent was asked in a questionnaire to provide demographic and behavioral data. Additionally, the Q-sort data were analyzed using the program QUANAL.[94] Statement positions were studied using z-scores and factor analysis.[95]

Hypotheses

A series of hypotheses were tested: the agreement hypotheses were measured by correlation of group orientations; the statement hypotheses were measured in the Q-analysis; and the typology hypotheses were measured in analysis of variance.

Agreement Hypotheses

H.1: Agreement will vary across group orientations.

H.1.a. Official-Public agreement will be positive and statistically significant.

H.1.b. Official-Media agreement will be negative and statistically significant.

H.1.c. Media-Public agreement will be negative and statistically significant.

The hypotheses predict that members of the news media will hold distinct orientations about privacy that will be in opposition to officials and the general public. Of the three groups, media are routinely placed in the occupational role of privacy invader.

Analysis of Variance

The orientation patterns were predicted to reflect the self-interests of each group in terms of target and invader, and that these differences should yield different response sets.

H.2. The type of the invader and the type of target of an invasion of privacy will be related to group differences.

Members of the news media were predicted to most value their own interest in investigation of public subjects. This fits with the "watchdog" role and the view that public lives are open to greater scrutiny because of the goals of self-governance. Thus, media members should see invasions by other invaders of non-public subjects as most offensive.

H.2.a. For media subjects, media invasions of public targets will be perceived as least invasion of privacy.

H.2.b. For media subjects, non-media invasions of non-public subjects will be perceived as greatest invasion of privacy.

Public officials should have greatest self-interest in the protection of their own privacy from media invasions. At the same time, because government is often a non-media invader, public officials should trust non-media invasions.

H.2.c. For officials, non-media invasions of non-public targets will be perceived as least invasion of privacy.

H.2.d. For officials, media invasions of public targets will be perceived as greatest invasion of privacy.

Members of the general public should value the "watchdog" role of the media as it relates to invasions of public targets, but not as it relates to non-public targets.

H.2.e. For the public, media invasions of public targets will be perceived as least invasion of privacy.

H.2.f. For the public, media invasions of non-public targets should be perceived as greatest invasions of privacy.

Q-factor Analysis

The statement factoring should yield at least three types of response representing the three a priori groups.

H.3. There will be at least three typal response patterns of invasion of privacy orientations, one for each of the a priori groups.

H.3.a. One typal response group will be primarily members of the news media group.

H.3.b. One typal response group will be primarily members of the public officials group.

H.3.c. One typal response group will be primarily members of the general public group.

It is not possible to predict, in advance, whether or not the factor types will be intercorrelated. Neither is it possible to predict the degree of group homogeneity because no known previous research employs these statements on specific groupings of individuals.

Results

Data were collected from 18 individuals in Omaha, Nebraska during the period November 1989 to January 1990. Six subjects were selected from each of the a priori groups: media, public officials and members of the general public. News media and official respondents were selected based on occupation and significant contact with the other occupational group. Members of the general public were selected based on their willingness to participate and their lack of involvement with members of the local media and public officials or public life. Because previous research has suggested interpersonal coorientation between source-reporter work groups, the public group served as a test of the degree to which orientations are shared through communication networks, or by other means.[96]

Demographics of the Sample

Various demographic data were collected for descriptive purposes of analysis of those who sorted the statements: age; gender; education; political affiliation; media use and experience; and community ties.

Age. The six public officials had the oldest average age, 47. The oldest official was 64, and the youngest in the sample was 23. The average age of the media group was 33. The oldest reporter was 53, and the youngest was 22. The average age of general public members was 35. The oldest was 42, and the youngest was 29.

Gender. Among those in the media group, five were male and one was female. Among those in the official group, five were male and one was female. In the general public sample, three were male and three were female.

Education. The media group had the highest level of formal education. All had some college, four of six had graduated from college, two had graduate school experience and one had a graduate degree.

The official group all had some college, three had a degree but only one had some graduate school experience.

Three of the six in the public group had graduated high school with no further education, two had some college, one had a college degree and none had graduate school backgrounds.

Political Affiliation. In the media group, four were Democrats and two were Republicans. In the official group, four were Republicans, one was a Democrat and one did not respond to the question. For the public group, three were Democrats, two were Republicans and one had no affiliation.

Media Use and Experience. All members of the media and official groups were regular newspaper readers. Four of the six members of the public group were. All of those participating in the study said they watched local television news sometimes. Five of six officials, two of six media people and one general public respondent watched television news always.

Five of the six members of the media, all six members of the officials and two members of the general public had been subjects themselves of news stories.

Community Ties. Four of six officials, two members of the media group and one member of the general public group had strong community ties, responding that they had lived in the community all or most of their adult lives and planned to stay.

Importance of Privacy. The subjects were asked how they felt about the importance of the issue of invasion of privacy. Five of six media, four of six officials and three of six in the general public felt it was very important. One member of the general public was the only respondent who did not see the issue as at least somewhat important, and he did not say it was not, but simply that he did not know.

Agreement Results

The correlation of *a priori* groups found significant positive relationships between group orientations. These data did not support the hypothesis of dramatic group differences.

[INSERT TABLE 1 ABOUT HERE]

H.1: Agreement will vary across group orientations.
NOT RETAINED

Because all relationships were positive and statistically significant, only H.1.a., that predicted officials and the public will hold similar orientations, was retained.

H.1.a. Official-Public agreement will be positive and statistically significant. RETAINED

H.1.b. Official-Media agreement will be negative and statistically significant. NOT RETAINED

H.1.c. Media-Public agreement will be negative and statistically significant. NOT RETAINED

A majority of the individual correlation coefficients were positive and statistically significant at the .05 level with magnitudes greater than .29.

[INSERT TABLE 2 ABOUT HERE]

ANOVA Results

The overall orientations of the three groups were more similar than different, and the general hypothesis of group differences was not retained.

H.2. Group orientations will vary along the invader and target dimensions. NOT RETAINED

An analysis of the group orientations by statement groupings reveals some differences, but they were not in the predicted directions.

[INSERT TABLE 3 ABOUT HERE]

The three groups--media, officials and the public--all responded that the examples of non-media invasions of non-public subjects were the greatest invasions of privacy. All three groups also saw the examples of non-media invasions of public subjects as the least invasions of privacy.

The differences, where they occurred, were on the statements representing media invasions: officials were more concerned about media invasions of public subjects, and the public group was more concerned about media invasions of non-public people.

The main effects of type of invasion--media or non-media--were significant (F = 57.18; p < .01). The main effects of type of target--public or non-public--were not significant (F = 1.61; p < .23). The interaction effects of type of invasion and type of target were significant (F = 63.85; p < .01), as were the interaction effects of type of target and respondent group (F = 5.31; p < .02). But there were no significant interaction group effects for type of invasion (F = 0.30; p < .75). And the overall interaction effects of type of invasion, type of target and respondent group was not significant (F = 1.86; p < .20).

The predicted group orientations--except for one--were not retained.

H.2.a. For media subjects, media invasions of public targets will be perceived as the least invasions of privacy. NOT RETAINED

H.2.b. For media subjects, non-media invasions of non-public subjects will be perceived as the greatest invasions of privacy. RETAINED

H.2.c. For officials, non-media invasions of non-public targets will be perceived as the least invasions of privacy. NOT RETAINED

H.2.d. For officials, media invasions of public targets will be perceived as the greatest invasions of privacy. NOT RETAINED

H.2.e. For the public, media invasions of public targets will be perceived as the least invasions of privacy. NOT RETAINED

H.2.f. For the public, media invasions of non-public targets should be perceived as the greatest invasions of privacy. NOT RETAINED

Factor Analysis of Q-sort Orientation Patterns

Despite the failure of the ANOVA predictions, and despite the similarity of orientations between groups, the factoring of individual responses yielded three patterns in which members were closely associated with their original groupings as members of the media, official and public subjects.

> H.3. **There will be three at least three typal response patterns of invasion or privacy orientations, one for each of the a priori groups.** RETAINED

The three factor solution produced response types that contained mostly homogenous _a priori_ group membership.

[INSERT TABLE 4 ABOUT HERE]

H.3.a. One typal response group will be primarily members of the media group. RETAINED

H.3.b. One typal response group will be primarily members of the public officials group. RETAINED

H.3.c. One typal response group will be primarily members of the general public group. RETAINED

Correlations between the three factor types were positive and statistically significant. The correlation between the mostly **media type and the mostly officials type was .51; the correlation between the mostly media type and the mostly public type was .58; and the correlation between the mostly official type and the mostly public type was .53.**

To understand more about the responses in each of the three groups, it is useful to do an analysis of the specific statements that were the sources for the orientation patterns.

Typal Responses

Thirty-six of the forty-eight statements produced strong positive or negative responses from at least one of the factor types. In many cases, more than one of the types responded similarly, but there were some significant differences.

[INSERT TABLE 5 ABOUT HERE]

Media. For the media factor type, the statements in which the respondent group agreed there was an invasion of privacy, but the other two types did not, included: 19. (MR) "A newspaper photographer sneaks into a private backyard to get wedding reception pictures" ($z = 1.0$); 40. (NR) "An employer uses surveillance systems to assess worker productivity" ($z = 1.1$); and 44. (NR) "Police stop people on the street and ask to see identification" ($z = 1.3$). The statements where the media type saw no invasion of privacy, but were alone in that perception, were: 2. (MU) "The local newspaper launches an independent investigation of political corruption at city hall" ($z = -1.9$); 21. (MR) "A reporter reveals that a private club has discriminatory membership qualifications" (z = -1.1); 25. (NU) "Police question a political leader about recent activities" (z = -1.0); and 28. (NU) "A candidate for public office is asked to disclose private business holdings" (z = -1.3).

Officials. For the public official factor type, the statements in which officials were the lone type to see invasion of privacy were: 5. (MU) "A newspaper reports the mayor's 13-year-old daughter has had a drug overdose" (z = 1.6); 12. (MU) "The news media falsely report that a public official has been arrested for drunk driving" (z = 1.6); and 48. (NR) "Someone digs through garbage to learn about personal behavior" (z = 1.4). The statements where public officials were the lone factor type to see no invasion of privacy were: 10. (MU) "News media use spy satellites to obtain pictures and report on massive military troop movements" (z = -1.1); 17. (MR) "A TV camera person stands on a public street and takes pictures of customers through a business window" (z = -1.0); 30. (NU) "A group of people gather around a movie star asking for an autograph" (z = -1.0); 32. (NU) "A famous person having dinner in a restaurant is approached for a handshake" (z = -1.0); 33. (NU) "Groupies go to a local hotel looking for the room of a rock star" (z = -1.3); and 37. (NR) "The FBI places a legal wiretap on the telephone of a suspect" (z = -1.3).

Public. For the general public factor type, the statements the group was alone seeing as invasions of privacy were: 15. (MR) "A reporter studies individual tax records for a story on fraud" (z = 1.1); 39. (NR) "Local police open personal mail during a criminal investigation" (z = 1.6); and 41. (NR) "retail stores share credit information about customer charge card payment" (z = 1.5). The general public factor type was alone in seeing no invasion of privacy in the statements: 1. (MU) "An uninvited member of the local news media attends a political fundraiser for the governor" (z = -1.2); 24. (MR) "Local news media join police for coverage of a drug raid at a private residence" (z = -1.2); and 31. (NU) "Baseball fans are in the parking lot after a game waiting for a player to walk to his car" (z = -2.4).

Significant Differences in Privacy Orientation

The orientations of each factor type was compared with the combined orientation of the other two.

[INSERT TABLE 6 ABOUT HERE]

For the media type, employer surveillance was seen as an invasion of privacy, but that was not the case for the other two groups. For the media type, disclosure of information about business holdings, recent activities and corruption where public officials were involved were not seen as invasions, but that was not the case for the other two groups. The same difference was seen was the example was of a reporter revealing discrimination on the part of a local realtor.

For the public official type, media accounts of a drug overdose by an official's daughter and the false account of an official's drunk driving were seen as an invasion of privacy, but that was not the case for the other two groups. Officials also had a unique privacy sensitivity about their garbage cans. Television pictures of business customers and groupies search for a rock star were not seen as invasions of privacy in the eyes of the public official type, but that was not the case for the other two groups.

For the general public type, tax records and consumer credit information were sensitive areas, but that was not the case for the other two groups. And the public was different from media and officials in that they did not see candidates' college records, famous peoples' use of their names and baseball players' after-game actions as sensitive areas, but that was not the case for the other two types.

Consensus Privacy Areas

Despite typal differences, there was a body of statements where all three types agreed on statements which did and did not represent invasions of privacy.

[INSERT TABLE 7 ABOUT HERE]

The three types of respondents--media, officials and the public--saw five statements as representative of invasions of privacy: 47. (NR) "Someone enters a private home without consent" (z = 2.2); 26. (NU) "A rival political party places an illegal wiretap on the mayor's home telephone" (z = 1.8); 38. (NR) "An insurance company obtains medical records without consent" (z = 1.3); 20. (MR) "A local TV station reports that a businessman is having an affair" (z = 1.3); and 8. (MU) "A movie star is show in bed in a homosexual relationship" (z = 1.2). All five items dealt with the home, one's personal health or the bedroom. These areas seem to be the ones which all can agree upon as needing privacy protection.

The three types agreed upon only one statement as not being an invasion of privacy: 27. (NU) "A citizens group studies campaign contributions to a local office holder" (z = -1.0). Media investigations are suspect in the eyes of officials and the public; government probes are suspect in the eyes of media and the public. Thus, it is only an independent citizens group looking into the actions of a public office holder that is seen by all three types as a trusted "watchdog."[97]

Interpretations and Conclusions

Invasion of privacy was found to be an important social concept among those studied in the present research. Whether the respondent was a member of the local news media, an elected public official or a general public citizen, privacy was seen as important.

Respondents were asked to talk about invasion of privacy following their participation in the Q-sort, and several added comments that were useful.

Many of the examples of invasion of privacy involved news photography or visual images. A wire service photographer said, "We're not blood-thirsty."[98] He expressed concern about photographs of grieving family members and claims of media exploitation. But he also hoped that by shooting the picture and publishing it, future lives may be saved: "I view my photography as education."[99]

The general role of reporters, one said, impacts upon his reaction to the privacy statements:

> It's bound to have given me a more lenient view of "invasions" perpetrated by the media in its role as watchdog of public institutions and elected officials.[100]

One member of the media group expressed concern about the people he covers. He said it is important to try to be fair, and he tries to put himself "in the shoes of the people being covered."[101] He went on to explain an example:

> Despite the win-at-all-costs aggressiveness of many reporters, there is a lot to be gained from restraint in some instances. In one case, I was assigned to shoot the home of a man who was involved in a notorious divorce case. When we arrived at his home, which was set well back from the road and obscured by trees, he was not there. We debated for 15 minutes on whether to enter the property anyway for some video. We decided against it just as he drove up, saving us from an embarrassing trespassing charge.[102]

Part of the "watchdog" orientations of journalists seems to be related to concern over the powers of government. One reporter said: "I believe it is important to keep our police from becoming too powerful and imposing on personal rights."[103] Privacy, then, for a reporter involves a delicate balance "not to unnecessarily invade the privacy of another; on the other hand, not to let a public official hide something under the guise of privacy."[104]

Public officials in the study seemed to recognize that news media have a role as a check on government. "Anyone who is a public official for anytime at all," he said, "accepts life in the fishbowl or isn't in it very long."[105]

Officials expressed some concern over media coverage of private financial matters, but only two of the six added more information beyond the Q-sort. The most elaborate response reflected concern over the impact of media coverage.

> I have seen people hurt by news media reports that, in my opinion, should not have been reported. Someone wanted to "scoop" the other news media.[106]

The public officials in the sample displayed a sensitivity to media coverage of the actions of officials. This orientation separates them from the general public. It is the experience as the targets for news coverage that may make the difference.

The general public, like officials, did not add much in their responses to the open-ended survey questions. One said she was concerned about public use of private social security numbers.[107] Privacy, as it is seen by people not in media or public life, is very much something related to home and personal sphere:

> Our home was robbed, and it was the worst invasion of privacy there is.[108]

Therein lies an important consideration in the study of the concept of invasion of privacy. Despite the media and public attention given to the cases where media are said to have invaded the private lives of public people, these instances probably are of little serious concern for many members of the general public; when they think of invasion of privacy, they see their homes, their personal records, their finances and their most private acts as deserving of protection.

For media, the role of public "watchdog" and educator alters their orientations to reflect the social norm that says public people give up a degree of privacy protection.[109]

For public officials, the fact that they are the targets for more media than non-media invasions of privacy explains their higher degree of sensitivity when it comes to the media. At the same time, however, because they are part of a government most often connected to non-media invasions, a higher level of trust follows for such actions.[110]

Privacy, at one level, can be understood as a legal concept which may be associated with the privilege to criticize official conduct.[111] From a media perspective, limiting the invasion of privacy--in particular where the target is a public person--may be seen as support for governmental secrecy.[112] Such support would seem to undermine the "watchdog" press role.

But at the social level, the media "watchdog" role is not a given. Those who are not in the press may or may not support such a function. Chafee, for example, writes that social interests of such laws are balanced against the general social interest in truth.[113]

The difficulty of invasion of privacy as a legal concept may be that it exists at two stages of press action, during the gathering of information and at the point of publication.[114] So, the distinctions made by members of the media, officials and the general public may vary. When it comes to pre-publication invasion, the media may not be seen as dangerous as law enforcement, private detectives, credit bureaus and other experts in the art of information-gathering. But, it is the ability to publish and disseminate widely the information obtained that provides media with added firepower. In this sense, the real damage media can do is not unlike the developed constitutional provisions of libel. Most pre-publication invasions that are perceived as significant involve areas of personal life already protected by provisions such as trespass and harassment laws.[115]

In the present study, public officials were distinct from the other two groups in that they saw media reporting on a personal tragedy of an official's daughter and a false claim of an official's drunk driving arrest as invasions. They also saw any digging through garbage cans to learn about personal behavior as an invasion, but this privacy protection could be connected with other civil rights.

In the present study members of the general public were exclusively sensitive to privacy related to tax records and credit information, but these aspects of private life are not routinely part of news coverage.

When one considers the social view of invasion of privacy, the tort law becomes less viable as a legal concept. Of the consensus items in which all respondents in the present study saw invasion of privacy, only one item was directly related to media coverage: "A local TV station reports that a businessman is having an affair." Such an example carries with it no apparent public issue concern. The other consensus items dealt with illegal entry into a private home, an illegal wiretap, private medical records and the bedroom. So, when one considers news media invasion of privacy in context with other privacy concerns, the actual problem for media can be reduced to three conditions necessary to give rise to a legitimate privacy claim: (1) where media information gathering involves no legitimate public issue; (2) where information itself involves sensitive private topics such as goings-on in the bedroom, individual personal health or personal finances; and (3) where dissemination of the information through publication or broadcast actually takes place. Absent these conditions, any attempt to claim invasion of privacy against media would seem to run contrary to social norms.

Future research is needed to cut beneath the surface of the individual responses in this study. Although it has been possible to identify examples of invasions of privacy that trigger sensitivities, it is not known how or why these individual sensitivities exist, or what psychological functions they serve.

Invasion of privacy is a legal concept so related to social norms that future development of the law would seem to require adequate understanding of the shared meanings of the concept. Yet, for too long the legal philosophy of this century has been employed by the courts in invasion of privacy cases without an empirical basis. Time has long passed for the need to reconceptualize invasion of privacy based upon social findings.

Final Note: Sources of Similarities and Differences

A fruitful area of future research will be to isolate the sources of group similarities and differences. It was noted that most of the theoretical variance was accounted for in the non-media invasions where all three groups reflected similar patterns of disagreement when the target was public, and agreement when the target was not. When the invasion was by media and the target was public, media and officials were in the greatest disagreement; when the invasion was by media and the target was non-public, it was media and the public that were in the greatest disagreement.

That is, most of the disagreement between media and the other two groups appeared to be rooted in the sensitivities or self-interests of the target groups affected. Aside from the self-interests, the groups--for the most part--were in agreement that non-media invasions of non-public subjects were of the greatest concern. What is not known, are the socialization factors that produce the orientation pattern and what connection the pattern has with being socialized to live in a society that values freedom, individuality and privacy.

Future research should focus on communication theory[116] which applies specifically to the questions at-hand. For example, research provides conflicting evidence suggesting that media workers are both cynical toward and responsive to their audiences.[117] Further, "assimilation" is possible when groups interact frequently.[118] The present data raise a critical, yet unanswered question: If orientations toward concepts such as "privacy" are similar across social groups, then what role do mass communicators and mass communication content play in the melding of beliefs?

NOTES

[1] Phillip E. Hassman, "Invasion of Privacy by Use of a Picture of Plaintiff's Property for Advertising Purposes," 87 ALR 3d 1279-84. Invasion of privacy often has to do with use of a photograph, but the tort law goes well beyond this narrow construction.

[2] Cooley wrote: "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 2d, 29 (1888). Cf. John Stuart Mill, On Liberty (1859): "To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society."

[3] T. Barton Carter, Marc A. Franklin and Jay B. Wright, The First Amendment and the Fifth Estate, Regulation of Electronic Mass Media, Privacy, Chapter XIII, Mineola, New York: The Foundation Press, Inc., 1986, pp. 498-537.

[4] e.g. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973), reh'g.den., and 533 F.Supp. 1076 (S.D.N.Y. 1982).

[5] Time Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

[6] Sidis v. F.R. Publishing, 113 F.2d 806 (2d Cir. 1940).

[7] Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971).

[8] Edward J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," 39 N.Y.U.L. Rev. 962 (1964).

[9] "Tortious Invasion of Privacy: Minnesota as a Model," 4 Wm. Mitchell L. Rev. 163 (1978).

[10] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4(5) Harvard L. Rev. 193 (December 15, 1890).

[11] Id.

12
Supra, note 2.

13
Warren and Brandeis, at 195.

14
Id.

15
Id., fn. 7.

16
New York Times, June 18, 1890, bottom of page 3.

17
Warren and Brandeis, at 196.

18
Id., at 214-18.

19
Id., at 220.

20
William L. Prosser, "Privacy," 48(3) California L. Rev. 383 (August 1960).

21
Id.

22
Prosser, at 386-87.

23
Prosser, at 389. A decade later, Prosser's review was expanded to over 400 cases, but the same categorization was retained. See Prosser, Torts, 4th (1971), at 802.

24
Prosser (1960), fn. 199, at 408.

25
Id., at 417.

26
Id., at 423.

27
Wallace D. Loh, Social Research in the Judicial Process, New York: Russell Sage Foundation, 1984.

28
Fred Kerlinger, Foundations of Behavioral Research, 2d, New York: Holt, Rinehart and Winston, Inc., 1973.

29
Thomas I. Emerson, *The System of Freedom of Expression*, [illegible]rk: Random House, 1970.

[illegible]*a*, note 8.

31
Emerson quotes from, Milton R. Konvitz, "Privacy and the Law: A Philosophical Prelude," 31 *Law and Contemporary Problems* 272, 279-80 (1966): "Its essence is the claim that there is a sphere of space that has not been dedicated to public use or control. It is a kind of space that a man may carry with him, into his bedroom or into the street."

32
Alan F. Westin, *Privacy and Freedom*, New York: Atheneum, 1967, p. 7: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

33
Emerson, p. 545.

34
Emerson (p. 546) summarizes Westin's functions: "(1) protection of personal autonomy--the avoidance of being manipulated or dominated by others; (2) permitting emotional release--relief from the pressure of playing social roles, from the emotional stimulations of daily life, from the need of strict compliance with social norms, and the like; (3) opportunity for self-evaluation--a chance to integrate one's experience into a meaningful pattern and exert one's individuality on events; and (4) allowance of limited and partial communication--permitting one to share confidences and to set boundaries of mental distance."

35
For a recent example, *see* Jeremy Harris Lipschultz, "Mediasat and the Tort of Invasion of Privacy," *Journalism Quarterly* 65(3):507-11 (Summer 1988).

36
Emerson, p. 549.

37
Id., p. 554.

38
Id., p. 556.

[39] Don R. Pember, Privacy and the Press, The Law, the Mass Media, and the First Amendment, Seattle: University of Washington Press, 1972, preface, x-xi.

[40] See Michael D. Sherer, "Photojournalism and the Infliction of Emotional Distress," 8 Communications and the Law 27-37 (April 1986).

[41] Deckle McLean, "Press and Privacy Rights Could Be Compatible," 8 Communications and the Law 13-25 (April 1986).

[42] Id., at 15.

[43] Donald L. Smith, "Privacy: The Right that Failed," in Keneth S. Devol (ed.), Mass Media and the Supreme Court, The Legacy of the Warren Years, Third Edition, New York: Hastings House, pp. 373-76.

[44] Arthur R. Miller, "Reporters Have a Right to Know, But the Public has a Right to Privacy," in Devol, pp. 377-81.

[45] Id.

[46] Id., p. 376.

[47] Neil Vidmar and David H. Flaherty, "Concern for Personal Privacy in an Electronic Age," Journal of Communication 35(2):91-103 (Spring 1985).

[48] Id., at 91-92.

[49] Id., at 93.

[50] Id., Table 1, List 1, at 96.

[51] Id., Table 1, List 2.

[52] Id.

[53] Id., Table 2, at 97.

[54] Id., Table 3, at 98.

[55] Id., at 103.

[56] Marilyn A. Lashner, "Privacy and the Public's Right to Know," Journalism Quarterly, 53(4):679-88 (Winter 1976).

[57] Kathleen L. Endres and Fred F. Endres, "Anatomy of the Coverage of a Sex Scandal: A Case Study Examination of the Rev. Jim Bakker Story," Southeast Regional Colloquium, Association for Education in Journalism and Mass Communication, University of Alabama, Tuscaloosa, March 1988.

[58] Id.

[59] Conrad C. Fink, Media Ethics, In the Newsroom and Beyond, New York: McGraw-Hill Book Company, 1988.

[60] Id., pp. 26-29.

[61] Id., p. 28.

[62] Id., p. 29.

[63] Id., p. 29, quoting Geraldine Ferraro.

[64] Id., p. 31. Fink cites the case study and ASNE research in Chapter 2.

[65] L. Erwin Atwood, "How Newsmen and Readers Perceive Each Others' Story Preferences," Journalism Quarterly, 47:296-302 (1970).

[66] Numerous anecdotal accounts from news people are available on how vivid television pictures have led to a station being swamped by audience member telephone calls and letters.

[67] Fink, p. 34, quoting an account from C. Fraser Smith on Marine victim families calling media to volunteer reactions to the Beirut bombing in 1984.

[68] Hustler Magazine v. Jerry Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).

[69] Id., 99 L. Ed. 2d 52.

[70] California v. Ciraolo, 476 U.S. 213.

[71] California v. Greenwood, 486 U.S. 35, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (1988).

[72] The Court's liberal minority led by Justices Brennan and Marshall have continued to fight for privacy rights in their dissents.

[73] Supra, note 71.

[74] Brennan, dissenting, in Greenwood, 100 L. Ed. 2d at 43.

[75] Id., at 44.

[76] John H.F. Shattuck, Rights of Privacy, ACLU, Skokie: National Textbook Co., 1977, quoting William Pitt, Earl of Chatham.

[77] Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communications, Freedom and Control of Print and Broadcast Media, 5th, Mineola, NY: The Foundation Press, Inc., 1986, pp. 200-293.

[78] Id.

[79] Id.

[80] The statements were collected from a group of fifteen senior-level college students in April 1989. Open-ended questioning can be helpful as a validity check on constructed research statements.

81
Id.

82
Kang Soo Lee, "Attitudes of Korean Government Officials and Newsmen Toward the Role of the Press, A Coorientational Study," doctoral dissertation, Southern Illinois University, 1978.

83
Supra, note 65.

84
Steven H. Chaffee, "Applying the Interpersonal Perception Model to the Real World," American Behavioral Scientist, 16:466 (1973).

85
Keith R. Stamm and W. Barnett Pearce, "Communication Behavior and Coorientational Relations," The Journal of Communication, 21:210-11 (1971); and James E. Grunig and Keith R. Stamm, "Communication and Coorientation of Collectivities," American Behavioral Scientist, 16:567 (1973).

86
Beth Heffner, "Communication Accuracy: Four Experiments," Journalism Monographs, No. 30 (1973).

87
For agreement, there will be three scores instead of one, and for accuracy and congruency, there will be six scores instead of two.

88
William Stephenson, The Play Theory of Communication, Chicago: The University of Chicago Press, 1967, 1988. Readers unfamiliar with Q-methodology often are concerned with the small number of respondents, and they raise questions about generalizability. However, the actual concern should not be with people, rather the statements. These should be grounded in theory, and it is the theory which allows the researcher to make generalizations.

89
William D. Brooks, "Q-sort Technique," in Methods of Research in Communication, Emmert and Brooks (eds.), Boston: Houghton Mifflin Co., 1970.

[90] The public/non-public dichotomy is employed because the conceptualization of a "private" figure is problematic. In a society, it is assumed that all actors have some degree of publicity to their births, lives and deaths. The media/non-media division also has its problems that need to be worked upon in future research: all media may not be equal (e.g. tabloid invasion may be different from mainstream press); and non-media invasion can be distinguished further as police/government and non-police/government.

[91] For forty-eight statements, a correlation must be greater than .29 to be significant.

[92] Jack M. McLeod, Lee B. Becker, and William R. Elliott, "Exploration of Methodological Problems in Coorientation Research," a paper presented to the Theory and Methodology Division, Association for Education in Journalism, Carbondale, Illinois, 1972.

[93] C. Mitchell Dayton, The Design of Educational Experiments, New York: McGraw-Hill, 1970.

[94] G. Norman Van Tubergen, Quanal: User's Guide, Lexington, Kentucky, 1975. Professor Van Tubergen deserves recognition for providing computer time and data analysis consultation in this study.

[95] R.J. Rummel, Applied Factor Analysis, Evanston: Northwestern University Press, 1970.

[96] See Jeremy Harris Lipschultz, "A Coorientational Analysis of Trial Lawyer and News Reporter Relationships," Law Division, Association for Education in Journalism and Mass Communication, Washington, D.C., August 1989.

[97] The concept of "watchdog" can be found in the occupational literature of journalism, but increasingly it is also being applied in social research. See George A. Donohue, Clarice N. Olien and Phillip J. Tichenor, "A `Guard Dog' Conception of Mass Media," Theory and Methodology Division, Association for Education in Journalism and Mass Communication, San Antonio, Texas, August 1987. Cf. David H. Weaver and G. Cleveland Wilhoit, The American Journalist, A Portrait of U.S. News People and their Work, Bloomington, Indiana: Indiana University Press, 1986.

98
Wire service press photographer, Nov. 17, 1989.

99
Id.

100
Newspaper reporter, Nov. 28, 1989.

101
Television news director, Nov. 29, 1989.

102
Id.

103
Radio reporter, Dec. 1, 1989.

104
Newspaper reporter, Dec. 13, 1989.

105
City councilmember, Nov. 14, 1989. He was one of two officials who factored into the media type in the analysis of statements. This was not surprising because before he became an elected official, he worked as a newspaper reporter and high school journalism teacher. The present paper does not address how to deal with such hybrid orientations.

106
County sheriff, Jan. 10, 1990. It is significant to note that what is described in this paper as an official orientation, to some degree, may be a law enforcement orientation.

107
Woman, Jan. 25, 1990.

108
Woman, Jan. 26, 1990.

109
Professor Jeremy Cohen, in a letter responding to initial interpretation of these data, writes: "Perhaps, for example, media respect the institution of public officialdom which carries the inherent (Meiklejohnian?) groundrule that voluntary entry into the public realm carries lessened expectations of privacy." Feb. 8, 1990.

110
Public officials "trust" of institutions--media, government and others--is a broad area which is in great need of exploration.

111
See Jeffrey A. Smith, "Prior Restraint: Original Intentions and Modern Interpretations," Law Division, Association for Education in Journalism and Mass Communication, Norman, Oklahoma, August 1986 at page 9 and fn. 73 relates Meiklejohn (1948) to coverage of "public issues."

112
Id., p. 22.

113
Zechariah Chafee, Jr., Free Speech in the United States, New York: Atheneum, Harvard University Press, 1969.

114
Theodore L. Glasser, "The Press, Privacy, and Community Mores," Speech Communication Association, Louisville, Kentucky, November 1982. Privacy does not function in a social vacuum.

115
Courts, however, do treat media invasion of privacy separately when they hear civil tort actions. It is the rare case when reporters have been arrested for obstructing justice, trespass or crossing police lines.

116
Jeremy Cohen and Timothy Gleason, Social Research in Communication Law, Newbury Park, CA: Sage, 1990.

117
Denis McQuail, Mass Communication Theory, An Introduction, Second Edition, Beverly Hills: Sage, 1988, at p. 161. McQuail, throught this book, shows how communication theory and normative theory address similar issues.

118
Id., at p. 157.

1. (MU) An uninvited member of the local news media attends a political fundraiser for the governor.

2. (MU) The local newspaper launches an independent investigation of political corruption at city hall.

3. (MU) Television camera people arrive--uninvited--at the home of a senator.

4. (MU) Local media report the mayor is cheating on his wife.

5. (MU) A newspaper reports the mayor's 13-year-old daughter has had a drug overdose.

6. (MU) Television shows pictures of a fire at the home of a labor leader.

7. (MU) Media report that a candidate for public office cheated on a college exam.

8. (MU) A movie star is shown in bed in a homosexual relationship.

9. (MU) A news photographer follows a famous person taking pictures at every opportunity.

10. (MU) News media use spy satellites to obtain pictures and report on massive military troop movements.

11. (MU) An entertainer's act is filmed without consent and shown on the evening news.

12. (MU) The news media falsely report that a public official has been arrested for drunk driving.

13. (MR) A cable TV company uses a computer to monitor viewing habits.

14. (MR) A magazine publisher sells mailing lists to sales people.

15. (MR) A reporter studies individual tax records for a story on fraud.

16. (MR) A newspaper story confuses the victim with the accused in a local robbery.

17. (MR) A TV camera person stands on a public street and takes pictures of customers through a business window.

18. (MR) A news reporter talks to an eye-witness by telephone and fails to say that the conversation is being tape recorded.

19. (MR) A newspaper photographer sneaks into a private backyard to get wedding reception pictures.

20. (MR) A local TV station reports that a businessman is having an affair.

21. (MR) A reporter reveals that a private club has discriminatory membership qualifications.

22. (MR) A reporter reveals that a local realtor will not show certain homes to minorities.

23. (MR) People in jail are photographed without their consent for a newspaper story.

24. (MR) Local news media join police for coverage of a drug raid at a private residence.

25. (NU) Police question a political leader about recent activities.

26. (NU) A rival political party places an illegal wiretap on the mayor's home telephone.

27. (NU) A citizens group studies campaign contributions to a local office holder.

28. (NU) A candidate for public office is asked to disclose private business holdings.

29. (NU) A grand jury calls a public official for questioning in a probe of government corruption.

30. (NU) A group of people gather around a movie star asking for an autograph.

31. (NU) Baseball fans are in the parking lot after a game waiting for a player to walk to his car.

32. (NU) A famous person having dinner in a restaurant is approached for a handshake.

33. (NU) Groupies go to a local hotel looking for the room of a rock star.

34. (NU) A restaurant names lunches after famous people.

35. (NU) A local charity asks a famous person to speak at an annual meeting.

36. (NU) A member of the U.S. Congress trying to shop is pursued by constituents with questions.

37. (NR) The FBI places a legal wiretap on the telephone of a suspect.

38. (NR) An insurance company obtains medical records without consent.

39. (NR) Local police open personal mail during a criminal investigation.

40. (NR) An employer uses surveillance systems to assess worker productivity.

41. (NR) Retail stores share credit information about customer charge card payment.

42. (NR) Telemarketers call people at home to try to sell consumer products.

43. (NR) A university researcher calls people at home to assess opinions on social issues.

44. (NR) Police stop people on the street and ask to see identification.

45. (NR) A close relative peeks inside a private diary.

46. (NR) A job applicant is asked to disclose information about leisure time activities.

47. (NR) Someone enters a private home without consent.

48. (NR) Someone digs through garbage to learn about personal behavior.

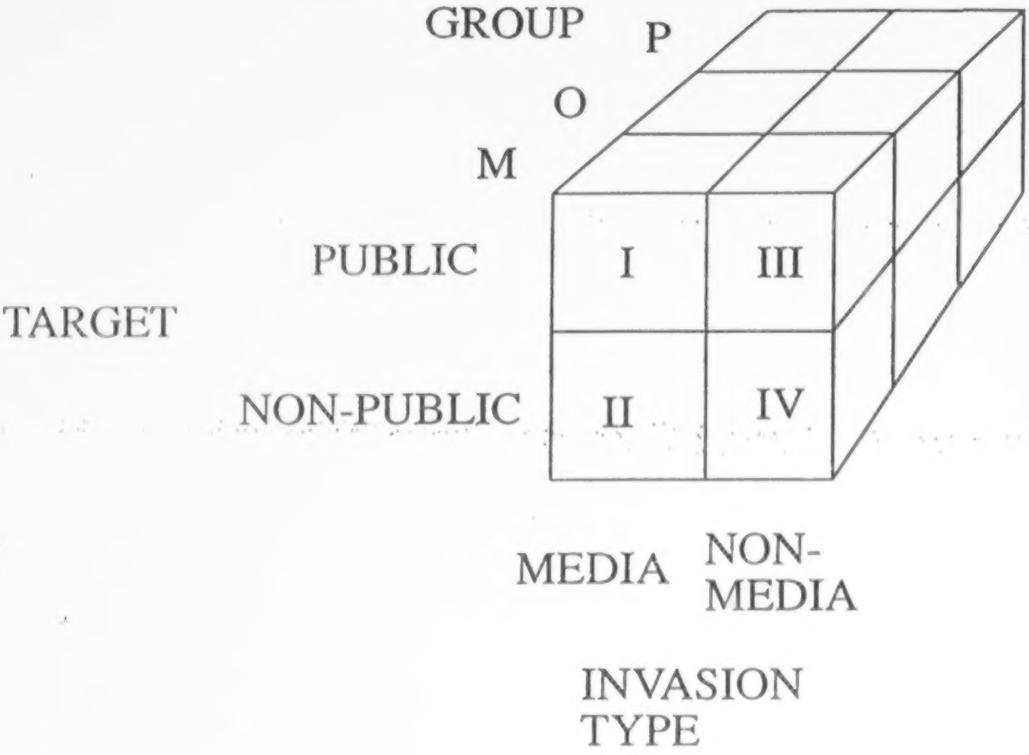

Figure 1. Theoretical cross-partition of privacy. Those invasions by media are distinguished from those which are conducted by non-media invaders; and public and non-public targets of the invasion are also considered in the model. The three response groups--media, officials amd the public--are shown in three-dimensional space.

Statement Distribution

N of Statements (N = 48)	1	2	3	6	8	8	8	6	3	2	1
Pile Number: (score)	1	2	3	4	5	6	7	8	9	10	11

Figure 2. Scoring for the Q-statements. The statement in pile number eleven--scoring an eleven--represents the single statement which an individual responds as most representative of an invasion of privacy. A statement placed in pile number six is considered neutral and scores six. The statement placed in pile number one is considered least representative of an invasion of privacy and scores a one. In the factor analysis, scores below the mean of six become negative when converted to z-scores.

Table 1. Correlation Coefficients for Original Groups: Media, Public Officials and General Public

	Media Members	Public Official	General Public
Media	1.00	.75	.61
Public Officials		1.00	.70
General Public			1.00

Table 2. Individual Correlations for the 18 Q-sort Respondents

	M1	M2	M3	M4	M5	M6	O1	O2	O3	O4	O5	O6	P1	P2	P3	P4	P5	P6
M1	--	.41	.53	.50	.48	.56	.60	.51	.40	.49	.38	.47	.41	.53	.08	.35	.26	.26
M2		--	.54	.63	.55	.56	.60	.53	.62	.27	.22	.38	.42	.29	.03	.31	.42	.38
M3			--	.56	.54	.52	.53	.34	.59	.30	.09	.50	.38	.34	.03	.27	.34	.13
M4				--	.69	.62	.65	.50	.66	.37	.28	.52	.50	.44	.24	.51	.41	.40
M5					--	.64	.62	.45	.42	.14	.03	.34	.33	.39	.06	.44	.15	.34
M6						--	.70	.55	.59	.35	.22	.46	.41	.47	.18	.36	.29	.21
O1							--	.59	.53	.47	.24	.53	.54	.57	.14	.62	.35	.37
O2								--	.41	.32	.46	.51	.36	.61	.18	.38	.36	.45
O3									--	.35	.22	.41	.49	.32	.18	.35	.31	.24
O4										--	.50	.57	.24	.44	.01	.20	.49	.26
O5											--	.54	.22	.37	.16	.21	.27	.23
O6												--	.27	.68	.24	.41	.44	.38
P1													--	.29	.22	.53	.26	.16
P2														--	.32	.46	.47	.49
P3															--	.18	.28	.28
P4																--	.08	.35
P5																	--	.24
P6																		--

Table 3. Cell Mean Score Values for Orientational Groups

Statement Category		A Priori Group	Score**
(I) MU.	Media invasion/ public target	All	5.85
		Media	5.46
		Officials	6.24
		Public	5.86
(II) MR.	Media invasion/ non-public target	All	5.98
		Media	5.75
		Officials	5.94
		Public	6.24
(III) NU.	Non-media invasion/ public target	All	5.10
		Media	5.36
		Officials	5.85
		Public	5.10
(IV) NR.	Non-media invasion/ non-public target	All	7.07
		Media	7.43
		Officials	6.97
		Public	6.81

** The overall neutral mean score is 6.00. Most of the variance is accounted for in the non-media invasions where all three groups reflect similar patterns of disagreement when the target is public, and agreement when the target is not. When the invasion is by media and the target is public, media and officials are in the greatest disagreement; when the invasion is by media and the target is non-public, it is media and the public that are in the greatest disagreement.

Table 4. Membership in the Factor Types of Privacy Orientations

	Original Groups		
Typal Groups	Media	Officials	Public
Type I (N = 9)	6	2	1
Type II (N = 4)	0	3	1
Type III (N = 5)	0	1	4

Table 5. Typal statement z-scores for a 3-factor solution

Number	Cell*	Statement	I(N=9) Media	II(N=4) Official	II(N=5) Public
1.	MU	An uninvited member of the local news media attends a political fundraiser for the governor.	-0.2	-0.7	-1.2
2.	MU	The local newspaper launches an independent investigation of political corruption at city hall.	-1.9	-0.7	-0.6
3.	MU	Television camera people arrive--uninvited--at the home of a senator.	-0.2	0.8	-0.4
4.	MU	Local media report the mayor is cheating on his wife.	0.2	1.8	1.4
5.	MU	A newspaper reports the mayor's 13-year-old daughter has had a drug overdose.	-0.7	1.6	0.3
6.	MU	Television shows pictures of a fire at the home of a labor leader.	-0.7	-1.1	-1.0
7.	MU	Media report that a candidate for public office cheated on a college exam.	-1.1	0.3	-1.4
8.	MU	A movie star is shown in bed in a homosexual relationship.	1.2	1.2	1.1
9.	MU	A news photographer follows a famous person taking pictures at every opportunity.	0.3	-0.1	-0.3

* The four category cells are: MU, media invasion of a public subject; MR, media invasion of a non-public subject; NU, non-media invasion of a public subject; and NR, non-media invasion of a non-public subject.

(continued on next page)

Number	Cell	Statement	I(N=9) Media	II(N=4) Official	II(N=5) Public
10.	MU	News media use spy satellites to obtain pictures and report on massive military troop movements.	-0.8	**-1.1**	0.7
11.	MU	An entertainer's act is filmed without consent and shown on the evening news.	-0.2	-0.3	0.9
12.	MU	The news media falsely report that a public official has been arrested for drunk driving.	0.6	**1.6**	-0.3
13.	MR	A cable TV company uses a computer to monitor viewing habits.	-0.5	-0.6	0.3
14.	MR	A magazine publisher sells mailing lists to sales people.	0.2	0.4	-0.5
15.	MR	A reporter studies individual tax records for a story on fraud.	-0.6	-0.9	**1.1**
16.	MR	A newspaper story confuses the victim with the accused in a local robbery.	0.3	0.8	0.2
17.	MR	A TV camera person stands on a public street and takes pictures of customers through a business window.	0.1	**-1.0**	0.1
18.	MR	A news reporter talks to an eye-witness by telephone and fails to say that the conversation is being tape recorded.	0.9	0.3	0.5

(continued on next page)

Number	Cell	Statement	I(N=9) Media	II(N=4) Official	II(N=5) Public
19.	MR	A newspaper photographer sneaks into a private backyard to get wedding reception pictures.	1.0	0.2	0.4
20.	MR	A local TV station reports that a businessman is having an affair.	1.5	1.5	0.8
21.	MR	A reporter reveals that a private club has discriminatory membership qualifications.	-1.1	0.4	-0.8
22.	MR	A reporter reveals that a local realtor will not show certain homes to minorities.	-2.0	0.5	-0.9
23.	MR	People in jail are photographed without their consent for a newspaper story.	-0.2	0.7	-0.0
24.	MR	Local news media join police for coverage of a drug raid at a private residence.	-0.4	-0.6	-1.2
25.	NU	Police question a political leader about recent activities.	-1.0	0.1	0.4
26.	NU	A rival political party places an illegal wiretap on the mayor's home telephone.	2.1	2.1	1.2
27.	NU	A citizens group studies campaign contributions to a local office holder.	-1.3	-1.2	-0.6
28.	NU	A candidate for public office is asked to disclose private business holdings.	-1.3	-0.2	0.1

(continued on next page)

Number	Cell	Statement	I(N=9) Media	II(N=4) Official	II(N=5) Public
29.	NU	A grand jury calls a public official for questioning in a probe of government corruption.	**-2.0**	**-1.1**	-0.4
30.	NU	A group of people gather around a movie star asking for an autograph.	-0.6	**-1.0**	-0.6
31.	NU	Baseball fans are in the parking lot after a game waiting for a player to walk to his car.	-0.0	-0.8	**-2.4**
32.	NU	A famous person having dinner in a restaurant is approached for a handshake.	-0.2	**-1.0**	-0.6
33.	NU	Groupies go to a local hotel looking for the room of a rock star.	0.1	**-1.3**	0.1
34.	NU	A restaurant names lunches after famous people.	0.2	**-1.8**	**-1.9**
35.	NU	A local charity asks a famous person to speak at an annual meeting.	-0.9	**-2.0**	**-2.0**
36.	NU	A member of the U.S. Congress trying to shop is pursued by constituents with questions.	-0.5	0.3	-0.7
37.	NR	The FBI places a legal wiretap on the telephone of a suspect.	-0.3	-1.3	-0.5
38.	NR	An insurance company obtains medical records without consent.	**1.8**	0.9	**1.3**
39.	NR	Local police open personal mail during a criminal investigation.	0.9	0.6	**1.6**

(continued on next page)

Number	Cell	Statement	I(N=9) Media	II(N=4) Official	II(N=5) Public
40.	NR	An employer uses surveillance systems to assess worker productivity.	1.1	-0.2	0.0
41.	NR	Retail stores share credit information about customer charge card payment.	0.3	-0.6	1.5
42.	NR	Telemarketers call people at home to try to sell consumer products.	0.5	0.1	0.1
43.	NR	A university researcher calls people at home to assess opinions on social issues.	-0.0	-0.5	-0.6
44.	NR	Police stop people on the street and ask to see identification.	1.3	0.4	0.7
45.	NR	A close relative peeks inside a private diary.	1.2	0.1	1.5
46.	NR	A job applicant is asked to disclose information about leisure time activities.	0.3	0.2	0.1
47.	NR	Someone enters a private home without consent.	2.3	1.8	2.4
48.	NR	Someone digs through garbage to learn about personal behavior.	0.3	1.4	-0.1

Factor I, the media type, contains all six members of the media, two officials and one member of the general public. Factor II, the official type, contains three officials and one member of the public sample. Factor III, the general public type, four members of the general public and an official.

Table 6. Items on which type x z-scores are greater or less than 1.00 difference in the average of the other two type z-scores.

Item	Type x	Average	Difference
Type I Media Responses Compared to Type II and Type III Officials/ Public Averaged Responses	**Type I**	**Type II/ Type III**	
34. (NU) A restaurant names lunches after famous people.	0.17	**-1.89**	2.06
31. (NU) Baseball fans are in the parking lot after a game waiting for a player to walk to his car.	-0.04	**-1.61**	1.57
40. (NR) An employer uses surveillance systems to assess worker productivity.	**1.12**	-0.10	1.22
35. (NU) A local charity asks a famous person to speak at an annual meeting.	-0.92	**-1.98**	1.05
28. (NU) A candidate for public office is asked to disclose private business holdings.	**-1.28**	-0.02	-1.26
25. (NU) Police question a political leader about recent activities.	**-1.04**	0.23	-1.27
2. (MU) The local newspaper launches an independent investigation of political corruption at city hall.	**-1.94**	-0.66	-1.28
29. (NU) A grand jury calls a public official for questioning in a probe of government corruption.	**-2.07**	-0.72	-1.35
4. (MU) Local media report the mayor is cheating on his wife.	0.22	**1.60**	-1.38
5. (MU) A newspaper reports the mayor's 13-year-old daughter has had a drug overdose.	-0.71	0.96	-1.67
22. (MR) A reporter reveals that a local realtor will not show certain homes to minorities.	**-2.02**	-0.21	-1.81

(Table 6 continued on next page)

Table 6. Items on which type x z-scores are greater or less than 1.00 difference in the average of the other two type z-scores.

Item	Type x	Average	Difference
Type II Official Responses Compared to Type I and Type III Media/ Public Averaged Responses	Type II	Type I/ Type III	
22. (MR) A reporter reveals that a local realtor will not show certain homes to minorities.	0.49	**-1.46**	1.95
5. (MU) A newspaper reports the mayor's 13-year-old daughter has had a drug overdose.	**1.58**	-0.19	1.77
7. (MU) Media report that a candidate for public office cheated on a college exam.	0.30	**-1.27**	1.58
12. (MU) The news media falsely report that a public official has been arrested for drunk driving.	**1.57**	0.12	1.45
21. (MR) A reporter reveals that a private club has discriminatory membership qualifications.	0.37	-0.91	1.28
48. (NR) Someone digs through garbage to learn about personal behavior.	**1.36**	0.13	1.23
3. (MU) Television camera people arrive--uninvited--at the home of a senator.	0.83	-0.28	1.11
17. (MR) A TV camera person stands on a public street and takes pictures of customers through a business window.	**-1.01**	0.09	-1.11
15. (MR) A reporter studies individual tax records for a story on fraud.	-0.90	0.26	-1.16
45. (NR) A close relative peeks inside a private diary.	0.07	**1.35**	-1.28

(Table 6 continued on next page)

Table 6. Items on which type x z-scores are greater or less than 1.00 difference in the average of the other two type z-scores.

Item	Type x	Average	Difference
Type II Official Responses Compared to Type I and Type III Media/ Public Averaged Responses	**Type II**	**Type I/ Type III**	
33. (NU) Groupies go to a local hotel looking for the room of a rock star.	-1.29	0.10	-1.39
41. (NR) Retail stores share credit information about customer charge card payment.	-0.63	0.92	-1.55

Table 6. Items on which type x z-scores are greater or less than 1.00 difference in the average of the other two type z-scores.

Item	Type x	Average	Difference
Type III Public Responses Compared to Type I and Type II Media/ Official Averaged Responses	Type III	Type I/ Type II	
15. (MR) A reporter studies individual tax records for a story on fraud.	1.09	-0.73	1.82
10. (MU) News media use spy satellites to obtain pictures and report on massive military troop movements.	0.74	-0.95	1.69
41. (NR) Retail stores share credit information about customer charge card payment.	1.50	-0.15	1.65
29. (NU) A grand jury calls a public official for questioning in a probe of government corruption.	-0.38	-1.56	1.19
11. (MU) An entertainer's act is filmed without consent and shown on the evening news.	0.91	-0.21	1.11
7. (MU) Media report that a candidate for public office cheated on a college exam.	-1.42	-0.41	-1.00
34. (NU) A restaurant names lunches after famous people.	-1.94	-0.83	-1.11
12. (MU) The news media falsely report that a public official has been arrested for drunk driving.	-0.32	1.06	-1.38
31. (NU) Baseball fans are in the parking lot after a game waiting for a player to walk to his car.	-2.38	-0.44	-1.93

Table 7. Consensus Items of All Respondents

Statements	Average z-score
47. (NR) Someone enters a private home without consent.	2.20
26. (NU) A rival political party places an illegal wiretap on the mayor's home telephone.	1.82
38. (NR) An insurance company obtains medical records without consent.	1.34
20. (MR) A local TV station reports that a businessman is having an affair.	1.26
8. (MU) A movie star is hown in bed in a homosexual relationship.	1.18
44. (NR) Police stop people on the street and ask to see identification.	0.79
18. (MR) A news reporter talks to an eye-witness by telephone and fails to say that the conversation is being tape recorded.	0.57
19. (MR) A newspaper photographer sneaks into a private backyard to get wedding reception pictures.	0.52
16. (MR) A newspaper story confuses the victim with the accused in a local robbery.	0.45
42. (NR) Telemarketers call people at home to try to sell consumer products.	0.23
46. (NR) A job applicant is asked to disclose information about leisure time activities.	0.18
23. (MR) People in jail are photographed without their consent for a newspaper story.	0.14
14. (MR) A magazine publisher sells mailing lists to sales people.	0.04
9. (MU) A news photographer follows a famous person taking pictures at every opportunity.	-0.02

Table 7. Consensus Items of All Respondents (continued)

Statements	Average z-score
13. (MR) A cable TV company uses a computer to monitor viewing habits.	-0.24
43. (NR) A university researcher calls people at home to assess opinions on social issues.	-0.36
32. (NU) A famous person having dinner in a restaurant is approached for a handshake.	-0.59
30. (NU) A group of people gather around a movie star asking for an autograph.	-0.72
24. (MR) Local news media join police for coverage of a drug raid at a private residence.	-0.73
1. (MU) An uninvited member of the local news media attends a political fundraiser for the governor.	-0.75
6. (MU) Television shows pictures of a fire at the home of a labor leader.	-0.91
27. (NU) A citizens group studies campaign contributions to a local office holder.	-1.02

TOWARD A DEFINITION
AND STANDARD METHOD OF ANALYSIS
FOR LIBEL BY IMPLICATION

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A student paper prepared for presentation to the Law Division at the annual conference of the Association for Education in Journalism and Mass Communication, August 9-12, 1990, Minneapolis.

TOWARD A DEFINITION
AND STANDARD METHOD OF ANALYSIS
FOR LIBEL BY IMPLICATION

> There are so many equivoques in Language, so many Sneers in Expression, which naturally carry one Meaning, and yet may intend another....[1]

In March 1989 the Pawtucket Evening Times was ordered to pay $278,600 in libel damages for something it did not say. The Rhode Island Supreme Court ruled that the newspaper's omission of certain facts from a story created a defamatory implication even though the disputed passage was literally true. The U.S. Supreme Court let the ruling stand when it denied certiorari in October 1989.[2]

The situation that gave rise to the story was this: Surgeon Paul J.M. Healey, president of the Pawtucket-Central Falls YMCA in Rhode Island, was conducting a monthly meeting of the board in 1980 following the YMCA's controversial termination of two employees. A man who claimed to be serving as a proxy for an absent board member wanted to attend the meeting. Healey told the man, Gerald Lampinski, that no arrangement had been made for a proxy and directed Lampinski to leave. Lampinski voiced his objection and left the room.[3]

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[1] 2 J. Trenchard and T. Gordon, Cato's Letters: Essays on Liberty, Civil and Religious, and Other Important Subjects 301 (1971).

[2] Healey v. New England Newspapers Inc., 555 A.2d 321 (R.I. 1989), cert. denied, __ U.S.__, 110 S.Ct. 63 (1989). The libel award, consisting of $28,600 in compensatory damages and $250,000 in punitive damages, was reported in the Wall Street Journal, Oct. 3, 1989, at B9, col. 4.

Meanwhile, protesters opposed to the two terminations were picketing at MacColl Field, some 400 feet away from the building in which the board was meeting. About 30 minutes after the meeting began, a YMCA employee told Healey that Lampinski had collapsed at MacColl field. Healey asked whether he could be of any help, and the YMCA employee told him that two people were administering cardiopulmonary resuscitation (CPR) and that an ambulance was either at the scene or on the way. That evening, Healey telephoned the hospital and learned that Lampinski had died.[4]

A news story headlined "Lampinski sons angry at YMCA board" appeared in the Pawtucket Evening Times two days after the meeting. It stated, in pertinent part:

> John [Lampinski] also said the family is ... angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting. Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed.[5]

The reporter who wrote the story, Edward Gaulin, had been an eyewitness to Lampinski's collapse and had helped administer CPR to the ailing man before a paramedic took over. An ambulance arrived on the scene about five to 10 minutes after Lampinski collapsed.[6]

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[3] Id. at 322-3.

[4] Id. at 323.

[5] Id. at 324.

Healey filed a libel suit and won. The court said a reader could reasonably conclude that Healey was asked to help Lampinski and refused, and that there was enough time for Healey to aid Lampinski. "The 'defamation' at issue here really consists of what was left unprinted as well as what was actually printed," the court stated.[7]

This kind of defamation, which has been alleged in many other cases in addition to Healey, is commonly called libel by implication. Such cases depart from the common law tradition of truth being a total defense for libel in that reports can be found actionable even when they are literally true.

Healey involved creation of a defamatory implication by omission of facts. More often, an allegation of libel by implication stems from language usage that the plaintiff claims is susceptible to a defamatory interpretation. For example, in Lowe v. Rockford Newspaper Inc.,[8] Robert Lowe sued as a result of a newspaper story that described him as "someone who said he was a local repo man ... who appeared to be trying to steal a car."[9] Lowe claimed the article falsely implied he was a thief, when in reality he was a bona fide automobile repossessor doing his job.

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[6] Id. at 323.

[7] Id. at 326.

[8] 534 N.E.2d 549 (Ill. App. 2 Dist. 1989).

[9] Id. at 551.

The trial court granted the defendant's motion to dismiss, but the Appellate Court of Illinois reversed and remanded the case. The appeals court stated that the first phrase, "said he was a local repo man," cast doubt on the legitimacy of the plaintiff's occupation. It noted that in the second phrase, "appeared to be trying to steal a car," the defendant could have used the verb "to take" or "to repossess." The result was that the statements, taken in the context of the entire article, were actionable because they implied the plaintiff was a car thief.[10]

The court in Lowe took issue with the newspaper's choice of words. Did that court go too far in trying to protect the plaintiff's reputation? Both state and federal courts have been dealing with libel by implication cases for years but have failed to develop a standard by which to judge these cases. It is the purpose of this paper to examine cases in which libel by implication was alleged, analyze and evaluate the reasoning applied, and propose a standard by which to decide these cases.

It is important to examine cases of libel by implication because unprincipled decisions can threaten either the defendant's right to free speech or the plaintiff's right to protect reputation. It is worth reiterating that in Healey the newspaper was ordered to pay libel damages because a story had false and defamatory implications, despite the literal truth of the disputed statement. Although newspapers can strive to produce clear, precise stories, they certainly do not have complete control over all the implications that readers might see in their stories. Readers draw inferences, and Healey showed that at least one court held a newspaper responsible for such an inference.

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[10] Id. at 552-3.

Should newspapers be held responsible for the implications of their stories? If so, under what circumtances? These are difficult questions, and courts dealing with allegations of libel by implication have recognized this. One court focused on the need to protect plaintiffs from unscrupulous writers "whose subtle art of insinuation is honed for destruction,"[11] while another found the potential for abridgement of free speech rights so great that it refused to recognize libel by implication:

> We believe the First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words. Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights.[12]

This paper will examine court treatment of libel by implication in an effort to determine how a proper balance between protection of reputation and free speech rights might be struck. Detailed examples of alleged libel by implication will be presented and categorized. The reasoning applied in these cases will then be evaluated for strengths and weaknesses. The paper will conclude by offering a suggested analytic framework for identifying libel by implication, as a first step toward predictability in the disposition of such cases.

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[11] Saenz v. Playboy Enterprises Inc., 841 F.2d 1309, 1314 (7th Cir. 1988).

[12] Janklow v. Newsweek Inc., 788 F.2d 1300, 1304 (8th Cir. 1986).

Libel by implication is by no means a new concept; cases dating back more than 40 years were found.[13] In addition, legal treatises and encyclopedias recognize the existence of libel by implication. According to one source:

> A mere inference, implication, or insinuation is as actionable as a positive assertion if the meaning is plain. The test is whether the words, taken in the sense in which they are reasonably understood under the circumstances by persons familiar with the language used, are capable of a defamatory construction.[14]

It is not, however, the goal of this paper to consider all cases of libel by implication. Instead, the paper will critically evaluate published state and federal court cases decided after the U.S. Supreme Court's April 21, 1986, ruling in Philadelphia Newspapers v. Hepps.[15] In Hepps, the Court placed the burden of proving falsity on private libel plaintiffs where the report was about a matter of public concern. This barrier would seem particularly imposing to plaintiffs claiming libel by implication for two reasons. First, in some cases the disputed report might be literally true but carry a false implication. Did plaintiffs in this situation succeed, despite the burden of proving falsity? Second, in other cases, the defamatory implication might be vague or imprecise, making it difficult to prove false. How did plaintiffs in this situation fare? Cases arising after the Hepps hurdle was erected were thought to be the most relevant for this inquiry.

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[13] See, e.g., Sanders v. Evening News Association, 21 N.W.2d 152 (Mich. 1946).

[14] 50 Am. Jur. 2d Libel and Slander Sec. 13, 528-9. See also 53 C.J.S. Libel and Slander Sec. 13, 47-8 and Prosser, Torts Sec. 111, 748-9.

[15] 475 U.S. 767 (1986). No U.S. Supreme Court cases dealing with libel by implication were found.

Also excluded from this study are cases in which allegations of false implication were treated by courts strictly as false light invasion of privacy cases.[16] Innuendo often is the basis of such claims, which allege that a false impression has been imparted to the reader. Nor will the study include cases in which allegedly defamatory implications were seen as nonactionable opinion; only cases in which the implications were seen as constituting assertions of fact will be treated here. The intention of this study is to focus on cases in which courts dealt squarely with the issue of libel by implication. It does include cases in which defendants invoked Illinois' innocent construction rule, which holds that a statement is not actionable if the words are reasonably susceptible to an innocent interpretation.[17]

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[16] See, e.g., Mitchell v. Random House Inc., 865 F.2d 664 (5th Cir. 1989), Tellado v. Time-Life Books Inc., 643 F.Supp. 904 (N.J. 1986) and Larsen v. Philadelphia Newspapers Inc., 543 A.2d 1181 (Pa. Super. 1988).

[17] The Illinois Supreme Court adopted the innocent construction rule in John v. Tribune Co., 181 N.E.2d 105 (Ill. 1962). Illinois is the only state with such a rule. Cases involving the innocent construction rule identified for

(Footnote Continued)

Libel by implication is broadly defined as defamation that is the product of innuendo, insinuation, inference or omission, rather than a literal reading of the disputed report. In the next section, examples of reports in which libel by implication was alleged will be examined in an effort to develop a more precise definition of the term.

THE CASES

A. Examples of libel by implication

A review of the cases involving libel by implication revealed that the cases could be sorted into three categories: implication arising from suggestive language, implication arising from omission of facts and implication arising from a strained interpretation of the report. Presented below are excerpts from some of the more easily categorized cases. Some plaintiffs contested several statements in a single news report, so one case

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(Footnote Continued)
this study were: Berkos v. National Broadcasting Co., 515 N.E.2d 668 (Ill.App. 1 Dist. 1987); Costello v. Capital Cities Communications, 532 N.E.2d 790 (Ill. 1988); Lowe v. Rockford Newspaper Inc., 534 N.E.2d 549 (Ill.App. 2 Dist. 1989) and Owens v. CBS, 527 N.E.2d 1296 (Ill.App. 5 Dist. 1988). Costello and Owens are not analyzed because they involved sound court rulings that the reports were not susceptible to an innocent construction. Owens involved a clear imputation of criminal behavior and Costello focused on blunt allegations of dishonesty. Thus, no implication existed and the defendants' use of this defense amounted to grasping at straws. The court's analysis of Costello is critiqued by J. Holisky in "Costello v. Capital Cities Communications Inc.: Illinois' Innocent Construction Rule Prevails over the Constitutional Privilege for Expression of Opinion," 21 J. Marshall L. Rev. 427 (1988).

might fit into more than one category. Moreover, not all statements fit neatly into one of these categories.[18]

1. Suggestive language

The majority of cases of alleged libel by implication involved what will be described here as suggestive language. It was the tone of these reports and the inferences they invited that lay at the heart of the plaintiffs' complaints.

Adams v. Daily Telegraph Printing Co.[19] is a case in point. At issue was the report of a news conference that took place about a year after two teenage boys were murdered. The murders remained unsolved, and the father of one of the boys commented on the status of the investigation at the conference. William C. Adams, the father of the other boy, filed suit, claiming that two television broadcasts concerning the conference implied either that he had murdered his son Keith and the other boy, Kent Hicks, or that by refusing to cooperate with authorities in the murder investigation he was guilty of a misprision of a felony.[20] According to a broadcast transcript provided in the case, Bobby L. Hicks, the father of Kent Hicks, said:

> [W]e would like to announce that Mr. Adams employed an attorney approximately a year ago and both he and his

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[18] It is acknowledged that these categories are a first step in an effort to establish an analytic framework in the muddled area of libel by implication and that some cases could, arguably, be categorized differently than they are here.

[19] 356 S.E.2d 118 (S.C.App. 1986).

[20] Id. at 120.

> [a]ttorney ... have refused to cooperate. The public is free to draw their own conclusion. I don't believe when our forefathers placed the Fifth Amendment in the Constitution that they intended it as a technicality to hide behind in a matter such as this, when your own child has been murdered.[21]

A broadcast by another television station included these comments by a station reporter:

> Bobby Hicks and his [w]ife told the news media they want no stone left unturned ... and they have offered to be questioned by law enforcement authorities through hypnosis or truth serum to clear themselves and prove their innocence.[22]

These comments were followed by some of the same statements by Bobby Hicks that were included in the other broadcast, beginning with "The public is free to draw their own conclusion."[23] The trial court found that the facts in the broadcasts were true and granted summary judgment. But the South Carolina Court of Appeals said that in doing so the trial court had missed the point -- the case turned on innuendo. The appeals court found that the language was susceptible to the inference that Adams had either murdered the teenagers or was withholding information about the murders. It reversed the trial court's ruling.

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[21] Id.

[22] Id. at 120-21.

[23] Id. at 121.

Another example of suggestive language that became the focus of a libel suit was found in Schiavone Construction Co. v. Time.[24] Ronald A. Schiavone, who owned a controlling interest in the construction company, alleged that the "sting" of the disputed report -- an insinuation that he was involved in a notorious murder -- was defamatory. The contested passage follows:

> The personal files of FBI Director William Webster ... reveal that the name of Schiavone appeared several times in the bureau's reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa. That detail would surely have intrigued both the Senate committee that approved Donovan's nomination ... and the special prosecutor this year.[25]

The U.S. Court of Appeals for the Third Circuit found this language susceptible to both a nondefamatory meaning (the appearance of Schiavone's name in the file could simply mean that he knew of facts relevant to the investigation) and a defamatory meaning (stemming from the statement that the committee would have been intrigued).[26] It remanded the case for a jury interpretation of the "sting" of this passage and subsequent determination of the truth of that sting.[27]

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[24] 847 F.2d 1069 (3d Cir. 1988).

[25] Id. at 1074.

[26] Id. at 1083.

2. Omissions

A few allegations of libel by implication involved the omission of facts that, if included, would have resulted in a less damaging or nondefamatory report. The absence of the information led to the allegedly defamatory implication. One example was found in the Healey case discussed earlier. A second example of allegedly libelous implication resulting from an omission of information was found in Ramada Inns Inc. v. Dow Jones & Co.[28] The suit resulted from articles in the Wall Street Journal about Ramada's entry into the business of casino gambling both in Las Vegas and in Atlantic City. Ramada objected to a passage in one of the articles that discussed the revenues Ramada would have to generate to break even at one of its casinos. The paragraph in contention follows:

> A casino executive in Las Vegas estimates that it will cost Ramada $825,000 a day to operate the Tropicana [in Atlantic City], suggesting $24.8 million in hotel and gaming revenues would be needed monthly to reach the break even point.
> By comparison, [a securities analyst] notes that casino grosses at Resorts International, the city's leader, have averaged only about $15.9 million in 1981's first seven months. Observers estimate that gaming revenues generally

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[27] Id. at 1085.

[28] 543 A.2d 313 (Del.Super. 1987).

account for about 80 percent of a hotel-casino's total gross.[29]

Ramada contended that other securities analysts had estimated the break-even point to be between $12 million and $15 million. The Delaware Superior Court in New Castle County found that the reporter who wrote the disputed paragraph had been aware of such estimates. Without the other estimates, the implication of the paragraph was that Ramada would be unable to achieve the necessary break-even figure and that the company would be under financial pressure from losses, the court said.[30] The court initially ruled that the story contained an actionable false inference but, following Dow Jones' application to reconsider, modified that stance. "Neither party contests the literal truth of the statement. ... the Journal's failure to temper the reported estimate with the other lower estimates does not transform the true assertion into a falsehood." The court granted Dow Jones' motion for summary judgment on this matter.[31] Its motion was denied with respect to other disputed portions of the article.

3. Strained interpretations

The third and final form of alleged libel by implication involved strained interpretations of the language in the report. One example occurred in Salerno v. Philadelphia Newspapers.[32]

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[29] Id. at 333.

[30] Id. at 325-26.

[31] Id. at 338.

[32] 546 A.2d 1168 (Pa.Super. 1988)

Joseph Salerno filed suit over a story he claimed defamed him by associating him with organized crime. The story focused on testimony Salerno's son Joseph Jr. gave against a reputed mob member. The headlines read "Canary's Dad Shot," "Son Testified Against Mob Figure Scarfo" and "Mob Boss Takes Revenge: Witness' Father Shot."[33] The text of the story began:

> Investigators said last night that the wounding of a South Philadelphia man at his Wildwood Crest motel appeared to be retaliation for testimony the man's son gave against reputed mob boss Nicodemo "Little Nicky" Scarfo.[34]

The Pennsylvania Superior Court rejected Salerno's claim, saying readers inevitably would conclude that the elder Salerno was an innocent victim of vengeance. The article neither explicitly stated nor implicitly suggested that he was associated with "the mob."[35] The Superior Court upheld the trial court's grant of summary judgment in favor of Philadelphia Newspapers.[36]

Another example of a strained interpretation was found in Nelson v. Associated Press Inc.[37] The suit involved a number of claims by psychic Janis Nelson, once the confidante of Palm Beach socialite Roxanne Pulitzer, over reports of Mrs. Pulitzer's sensational divorce trial. One of the disputed reports, a Newsweek article, stated:

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[33] Id. at 1169.

[34] Id. at 1172.

[35] Id.

[36] Id. at 1173.

[37] 667 F.Supp. 1468 (S.D.Fla. 1987).

> When the history of sleaze is compiled, however, this trial will be best known for its trumpet. Peter [Pulitzer] testified that his wife had seances featuring the black-draped horn. Her psychic, Janis Nelson, also weighed in with corroboration of some of Roxanne's infidelities. The trumpet became the tabloids' smoking gun, the brassy symbol of the delicious irrelevance of the entire proceeding.[38]

Nelson argued that the juxtaposition of the second and third sentences indicated she was involved in seances of a "pretty hokey" type.[39] The U.S. District Court described Nelson's reading of the report as a "tortured interpretation" and granted the defendants' motion for summary judgment.

Yet another example of a strained interpretation was found in Henry v. Taft Television and Radio Co.[40] The suit was filed by Lorraine Henry, who owned and lived in a house at 2618 Lockridge in Kansas City, Missouri. On May 22, 1986, a fire broke out at the house. The news anchor of a local broadcast station reported:

> Faulty wiring is to blame for a fire on Lockridge this morning. Six transients were inside the vacant

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[38] Id. at 1474.

[39] Id. at 1478.

[40] 774 S.W.2d 889 (Mo.App. 1989).

building ... when the fire started.[41]

The video portion of the report showed a fireman talking with a woman on the front porch of the house. That woman was Henry, who argued that the words "transients" and "vacant building" were defamatory. Apparently the homeowner believed the report implied she was a transient. She claimed that being a "transient" is to be associated with unsavory or illegal behavior. The Missouri Court of Appeals, however, said that the words at issue were ambiguous, and noted that a "transient" can also be a "guest or boarder."[42] The appeals court upheld the trial court's dismissal of the case.

Thus, allegations of libel by implication were found to arise from one of three conditions: suggestive language used by the writer, an omission by the writer or a strained interpretation by the plaintiff. How courts have handled these allegations will be discussed in the next section.

B. Court analysis of libel by implication

Four primary methods of court analysis of libel by implication were identified. The most commonly used method was simply a close and critical reading of the disputed report. Occasionally, courts would offer an alternative reading of the report, such as an innocent construction of an allegedly defamatory statement. Some courts attempted to show the existence of defamatory innuendo by stating that without such innuendo, the report would not have been newsworthy. Finally, one court performed a literal reading of the disputed report.

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[41] Id. at 890.

[42] Id. at 891. For other examples of strained interpretations, see also Jones v. American Broadcasting Cos., 694 F.Supp. 1542 (M.D.Fla. 1988); Jenkins v. KYW, a Division of Group W, Westinghouse Broadcasting and Cable Inc., 829 F.2d 403 (3d Cir. 1987); Southern Air Transport Inc. v. American Broadcasting Cos., 887 F.2d 1010 (D.C. Cir. 1989) and Johnson v. Delta-Democrat Publishing Co., 531 So.2d 811 (Miss. 1988).

1. Close and critical reading

In most of the cases identified for this study, courts analyzed plaintiffs' claims by scrutinizing transcripts of the disputed reports. No formal test was employed; each court used its own judgment and interpretation of the report to decide whether the defamatory innuendo was present. In fact, some courts made a point of stressing the subjectivity and individuality of the analysis by prefacing their findings with "in my view."[43]

The reasoning applied in a portion of the Ramada opinion not previously discussed exemplified the use of close and critical reading. The pertinent part of that opinion addressed Ramada's complaint about the reporter's use of "no comment" in the article to describe the Ramada spokesman's response to the reporter's questions. The reporter's use of "no comment" in two places in the article omitted what the spokesman was willing to discuss, resulting in what Ramada said was a defamatory report.[44] For example, in one instance, the reporter wrote of Ramada's request for financial statements from the previous owner of the Tropicana:

Correspondence between Ramada and the previous operators

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[43] See, e.g., Ramada Inns Inc. v. Dow Jones & Co., 543 A.2d 313, 325 (Del.Super. 1987) and Lowe v. Rockford Newspaper Inc., 534 N.E.2d 549, 552 (Ill.App. 2 Dist. 1989).

[44] 543 A.2d 313, 323-24 (Del.Super. 1987).

> in 1980 shows that the hotel repeatedly demanded the documents but never received them. Last year, Ramada finally did receive a balance sheet for the 10 months ended Oct. 31, 1979. Those documents, prepared by the previous owners instead of an accountant, contain notations that show Ramada wasn't convinced of their accuracy. (The Ramada spokesman won't comment except to say that the financial statements weren't needed.)[45]

In analyzing this passage the court noted that Ramada had not limited its comments to the statement that the financial statements were not needed, but had explained in detail why Ramada had waived the requirement for the statements and why this action had not harmed Ramada. The court stated:

> In the midst of an article reporting that Ramada had lost a substantial amount of money -- $30 million -- attributable to employee theft and skimming, the "no comments" are _in my view_ highly susceptible to the interpretation that Ramada was attempting to cover up its problems. For a public corporation with legally imposed reporting requirements, the "no comments" are, therefore _in my view_, capable of a defamatory meaning.[46]

This reasoning was representative of the analysis used in those cases in which courts applied close reading and critical evaluation. The repeated statement "in my view" highlights the subjectivity of the approach. The court offered nothing that would lead another court to the same conclusion.

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[45] _Id._ at 332 (emphasis omitted).

[46] _Id._ at 324 (emphasis added). Dow Jones' motion for summary judgment was denied with respect to this allegation.

Similar analysis was employed by the court in Lowe,[47] the case in which an automobile repossessor alleged that a newspaper article falsely implied he was a thief. The court stated:

> From our review of the article, we find that plaintiff is depicted as a car thief using the guise of an automobile repossessor to accomplish his deeds. In our opinion, the article is not susceptible to a reasonably innocent construction. Instead of using the verbs "to take" or "to repossess," defendants chose the verb "to steal." It takes no great leap of logic to conclude that one who steals is a thief.[48]

Here again, the court engaged in a highly subjective method of analysis to determine whether the article was potentially defamatory. Without a standard to follow, it is not inconceivable that another court would find the phrase "two people who appeared to be trying to steal a car" a nonactionable statement of opinion.[49]

The courts in Ramada and Lowe provided with their opinions complete transcripts of the disputed reports, as did most other courts dealing with allegations of libel by implication. Several courts employing close reading, including the Lowe court, said the contested reports had to be treated as a whole, and that the disputed remarks had to be evaluated in context. In the case of a television broadcast, the context included the video portion of the report.[50]

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[47] 534 N.E.2d 549 (Ill.App. 2 Dist. 1989).

[48] Id. at 552 (emphasis added).

[49] Id.

The court in Lowe also stated that the words and implications in the contested report were to be given their "natural and obvious meaning."[51] Other courts employed a similar standard, stating that the test of defamatory implication should focus on the effects the report would produce in the mind of the average reader[52] or the way the report would be construed by the common mind.[53]

The courts that decided these cases used a few common guideposts -- context and the impression created in the mind of the reader -- but failed to clear a path for other courts to follow in deciding such cases. The method of analysis they employed was not stacked in favor of either plaintiff or defendant, yet was highly subjective and lacked standards that would provide uniform decision-making.

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[50] Id. at 553. See also Healey v. New England Newspapers Inc., 555 A.2d 321 (R.I. 1989) and Southern Air Transport Inc. v. American Broadcasting Cos., 877 F.2d 1010 (D.C. Cir. 1989).

[51] Id. at 552, quoting Chapski v. Copley Press, 442 N.E.2d (Ill. 1982), in which the court stated the standard for determining whether a report was susceptible to an innocent interpretation.

[52] Salerno v. Philadelphia Newspapers, 546 A.2d 1168 (Pa.Super. 1988).

[53] Jones v. American Broadcasting Cos., 694 F.Supp. 1542 (M.D.Fla. 1988).

2. Alternative interpretation

Some courts attempted to show that the defamatory reading of the report was not the only possible reading by offering other interpretations. For example, in Schiavone,[54] the court noted that the mere presence of Schiavone's name in the FBI's files on Hoffa could indicate that Schiavone knew of facts relevant to the investigation or had past associations with Hoffa, neither of which was necessarily defamatory.[55] Similarly, the court in Henry noted that a "transient" can be a "guest or boarder"; the word need not imply "unsavory or illegal behavior" as the plaintiff had alleged.[56] In Woods v. Evansville Press Co., the plaintiff claimed that the following paragraph from a newspaper column contributed to the column's false implication that he was a dishonest person with financial problems:

> FitzGerald says he believes Woods will not be the owner and general manager of Channel 7 within two years. "Here's a possible scenario, based on what I know, and remember I'm not an economic expert," he said. "He owes a consortium of insurance companies $22 million," he explained. "And he has to make biannual interest payments on that money. He's going to make the one due at the end of this month, but after that, I'm not so sure."[57]

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[54] 847 F.2d 1069 (3d Cir. 1988).

[55] Id. at 1083.

[56] 774 S.W.2d 889, 891 (Mo.App. 1989).

[57] 791 F.2d 480, 482 (7th Cir. 1986).

The court said the column need not be read to imply that Woods was personally at the brink of financial disaster. Instead, FitzGerald's "possible scenario" could be read to imply that, due to inadequate revenues, the station would not pay its own way and Woods would sell the station sometime in the future.[58] This approach clearly favors the defendant; three of the four courts that offered alternative readings decided in favor of the defendant.[59]

3. Newsworthiness

Other courts attempted to bolster their findings of defamatory implications with a roundabout approach: If the report was not susceptible of the defamatory implication, they reasoned, it would not be newsworthy. Such was the case in *Adams*. The court argued that without the implication that William Adams was withholding information about the murder of the teenagers, or had himself committed the murders, the broadcasts would not have been newsworthy.[60]

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[58] *Id.* at 486.

[59] *See id.*, Woods v. Evansville Press Co., 791 F.2d 480 (7th Cir. 1986) and Nelson v. Associated Press Inc., 667 F.Supp. 1468 (S.D.Fla. 1987). The court in Schiavone Construction Co. v. Time, 847 F.2d 1069, 1083 (3d Cir. 1988) found that the statement, coupled with the innuendo that followed, gave rise to a genuine issue of material fact for a jury to decide.

[60] 356 S.E.2d 118, 122 (S.C.App. 1986). *See also* McCaig V. Talladega Pub. Co. Inc. 544 So.2d 875, 882 (Ala. 1989) (dissent).

Similar reasoning was employed in Berkos v. National Broadcasting Co.[61] In that case, Judge Christy Berkos, the plaintiff, claimed that a television newscast falsely imputed that he had committed a crime. The newscast, presented by reporter Peter Karl, dicussed an FBI investigation into judicial corruption in Illinois. Pertinent parts of a transcript of the newscast follow:

> [T]onight, we can report that we found the names of five more judges which appear in cases where the FBI allegedly put in "the fix." ... Judge Christy Berkos was on the bench at Branch 29 when Kenneth Rollings who was charged with battery, was found "not guilty." It is alleged that $500 was paid to influence that case.[62]

Presentation of the passage that mentioned Berkos was accompanied by a photograph of Berkos and a portion of an indictment in the Rollings case.[63] In assessing Berkos' claim that the newscast implied that he accepted a bribe and lacked the integrity required of a circuit court judge, the court stated:

> A reasonable viewer of ordinary intelligence might question what newsworthy value Karl's references to Berkos would have served, in the context of Karl's investigative report, absent the interpretation Berkos suggests.[64]

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[61] 515 N.E.2d 688 (Ill.App. 1 Dist. 1987).

[62] Id. at 670.

[63] Id. at 671.

[64] Id. at 674.

The appellate court reversed the trial court's dismissal of Berkos' libel claim and remanded the case for further proceedings. This method of analysis favors the plaintiff. Both courts that used this approach gave plaintiffs whose cases had been dismissed another chance.

4. Literal reading

The fourth and final method of analyzing allegations libel by implication found was literal reading of the disputed report. Such a method of analysis led, of course, to a finding that no defamation had occurred. It obviously favors the defendant. It is similar to a close and critical reading, but does not consider the possibility of defamatory meaning or implication arising from true statements of fact.

This method of analysis was used by the court in McCaig v. Talladega Publishing Co. Inc.[65] At issue was a newspaper report that discussed a meter inspection conducted by officers of a local electricity cooperative. The co-op board's president was quoted as saying the panel "needed to check out some things that were going on" and "to dig into some of the things I've been hearing."[66]

The article further stated that the inspection indicated McCaig's Motel and an adjoining restaurant had a residential rather than a commercial meter. Commercial rates were higher than residential rates, the article said, and the residential meter had resulted in the businesses being undercharged $6,640.45 over a period of 13 months. The businesses would be required to pay the shortfall, the article said. Several other alleged irregularities involving electricity meters also were reported. The article concluded by stating that members of the McCaig family had been spearheading a "Save Our Co-op" campaign.[67]

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[65] 544 So.2d 875 (Ala. 1989).

[66] Id. at 876.

Travis H. McCaig and Roy McCaig filed suit, alleging that the article was capable of a false and defamatory meaning. The court, however, disagreed. It said the article never accused the McCaigs of fraud or of stealing electricity. "The undisputed testimony of the parties indicates that facts set out in the article are in their most literal sense true," the court stated, and as a matter of law not capable of having a defamatory meaning.[68]

But Justice Jones disagreed with the six members of the court who felt the article was not capable of a defamatory meaning. Jones supported the approach discussed above: that without a defamatory implication, the report would not have been newsworthy.

> Indeed, one would be hard-pressed to perceive any newsworthiness or other purpose for publication if not to suggest that these plaintiffs were engaged in a clandestine scheme to cheat the system.[69]

Jones does not stand alone in his criticism of a literal interpretation of a libel by implication case. The South Carolina Court of Appeals that decided Adams was critical of the trial judge, who had held that the facts, without ascribing innuendo to them, were true. The appeals court stated that the trial judge had missed the point, and that "innuendo ... is at the heart of the case."[70]

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[67] Id. at 876-77.

[68] Id. at 878-79.

[69] Id. at 882.

In summary, McCaig was the only case in this study in which a majority of a court analyzed an allegation of libel by implication through a literal reading of the disputed report. A dissenting justice and courts in other cases argued that such analysis is inappropriate.

In addition to literal reading, the other methods of analysis found were close reading, offering of an alternative reading and pointing out the report's lack of newsworthiness without the innuendo. None offered a standard method of analysis that would promote predictability in these decisions. Such an approach is offered in the next section.

A PROPOSED TEST FOR LIBEL BY IMPLICATION

The preceding review of libel by implication cases revealed a major shortcoming: Courts failed to employ a standard analytic test, which resulted in subjective, case-by-case determinations of defamatory implication. This serves neither the plaintiff, who seeks to protect reputation, nor the defendant, who presumably wants to preserve free speech rights and avoid paying damages. Few cases of libel by implication ought to succeed, but there may be situations in which clever writers perform character assassinations without making false statements of fact. In addition, there may be cases in which reporters defame through the purposeful omission of facts. This section offers a test for libel by implication that is intended to serve as a first step toward predictability in cases in this muddled area.

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[70] 356 S.E.2d 118, 122 (S.C.App. 1986).

Some courts have refused to recognize libel by implication.[71] This approach is unacceptable because it is clear from the examples cited that reputation can be damaged severely enough through implication to warrant a remedy. For instance, several shareholder suits were brought against Ramada after publication of the Wall Street Journal stories about the corporation. Ramada said it spent nearly $3.9 million to settle the shareholder litigation and sought to recover it by suing Dow Jones for special damages. Although analysis of such cases is difficult, failing to provide a remedy would leave plaintiffs such as Ramada without recourse.[72]

Libel by implication also poses difficulties for defendants. Courts that are over-zealous in their findings could threaten free speech rights by holding media defendants liable for strained, unintended or unforeseen innuendo. As one court stated:

> A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory

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[71] See,e.g., Johnson v. Delta-Democrat Publishing Co., 531 So.2d 811, 813 (Miss. 1988); Janklow v. Newsweek Inc., 788 F.2d 1300, 1304 (8th Cir. 1986) and Price v. Viking Penguin Inc., 881 F.2d 1426, 1432 (8th Cir. 1989).

[72] Ramada Inns Inc. v. Dow Jones & Co., 543 A.2d 313 (Del. Super. 1987).

innuendoes that could be drawn from the article.[73]

Although a vigorous fault inquiry likely would dispense with many allegations of libel by implication, the fault inquiry in a libel case is the most expensive and time-consuming part of the trial. It would seem more efficient to eliminate suits before constitutional questions are reached, if possible. Courts also prefer such an approach. "Where there is no need to decide a constitutional question, it is a venerable principle of [the] Court's adjudicatory processes not to do so."[74] One way to dispose of suits on nonconstitutional grounds is to determine whether the disputed report has defamatory meaning. The test proposed below provides an analytic framework by which to seek an answer to this question.

Cases involving libel by implication are similar to cases involving a fact/opinion dispute. No bright line distinguishes fact from opinion, but the test set forth in Ollman v. Evans[75] gave courts some standards to apply. It eliminated the need to rely on a standardless "I know it when I see it"[76] approach. In an effort to bring a standard approach to libel by implication, a four-part test is offered below. It is based on the premise that defamation can result from implications, even though the words might be literally true. In addition, it focuses on defamation rather than fault. It is recognized that, just as with cases involving fact/opinion distinctions, there may be disagreement over the results of the test.

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[73] Woods v. Evansville Press Co., 791 F.2d 480, 487-88 (7th Cir. 1986).

[74] Webster v. Reproductive Health Services, __ U.S. __, 109 S.Ct. 3040 (1989)(O'Connor, J., concurring, quoting Ashwander v. TVA, 299 U.S. 288, 346 (1936) [Brandeis, J., concurring, quoting Liverpool, New York, and Philadelphia S.S. Co. v. Commissioner of Emigration, 113 U.S. 33, 39 (1885)]).

[75] 750 F.2d 970 (D.C.Cir. 1984).

[76] Justice Stewart's concurrence in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), a case in which the Court considered whether a movie was obscene.

1. The report must be considered as a whole.

The intention of this part of the test is to encourage courts to view, in context, the combined effects of words, phrases and sentences rather than rely on a literal interpretation of each statement. This prevents courts from ignoring libelous implications by finding each statement literally true. It also protects media defendants by preventing successful suits by plaintiffs who take statements out of context.

2. The average reader, giving words their natural and obvious meanings, must grasp the defamatory implication.

This prong is aimed primarily at discouraging strained interpretations while allowing courts to recognize an implication that is readily apparent to the average reader. Statements that are literally true can have obvious implications due to the meaning society attaches to them. Consider this example: The Memphis-Press Scimitar reported in 1971 that Ruth A. Nichols had been shot with a .22-caliber rifle by another woman, later identified as Mrs. Newton, who had discovered Mr. Newton with Mrs. Nichols in the Nichols home. In this society, the article clearly implies that Mrs. Nichols and Mr. Newton were having an adulterous affair. Mrs. Nichols filed suit, claiming libel by omission. What the article did not state was that Mr. Nichols and two neighbors also were sitting in the living room talking with Mr. Newton and Mrs. Nichols when Mrs. Newton allegedly arrived and fired the shot.[77]

3. The implication must be an assertion of fact capable of verification, not a defamatory opinion.

The purpose of this element is to distinguish libel by implication based on assertions of fact from protected opinion. Tests for opinion already are available.[78]

4. When the alleged defamatory implication arises from omission, disclosure of the omitted facts would have led the average reader to a nondefamatory interpretation of the report.

Courts are asked to consider the effect that including omitted facts would have on the mind of the average reader. It is quite likely that some plaintiffs will argue for the inclusion of facts that would not have changed the meaning of the article.

The effectiveness of this test as a first step toward guiding court decision-making in libel by implication cases can be examined by applying it to some of the issues in Ramada. The dispute over the Wall Street Journal's use of "no comment" to describe a Ramada representative's statement provides one example.

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[77] Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 414 (Tenn. 1978). The case was tried twice and ultimately decided in favor of the newspaper. B. Dill, The Journalist's Handbook on Libel and Privacy 65 (1986).

[78] See, e.g., Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984).

First, the court would have to consider the report as a whole. In doing so, it would have to recognize that the "no comment" passage was part of a story that discussed a $30 million loss by Ramada following its entry into the casino gambling business. By saying Ramada officials refused to comment on some reputedly inaccurate financial statements instead of including Ramada's explanation of its stance regarding the statements, the story implied that Ramada was hiding problems from shareholders. Taken out of context, the "no comment" likely would not be susceptible to this defamatory implication.

Strained interpretation of "won't comment" must be ruled out. Journalists would argue this is a simple description of refusal to respond to a question. Many readers, however, attach a negative connotation to terms such as "no comment," "won't comment" and "could not be reached for comment." For them, this is the response of someone who has something to hide. It therefore can be argued that the claim of survives the test's second prong.

Third, the implication that Ramada was hiding something from shareholders is, arguably, a statement of fact capable of being verified or refuted. Ramada claimed it provided much information regarding its handling of the financial statements and was not trying to hide anything.

Fourth, the implication arose from the omission of information about Ramada's response to a reporter's questions about the financial statements. The Ramada representative did not merely say the financial statements were not needed; rather, the representative explained in detail why Ramada had waived the requirement for audited financial statements from the former owners and why the waiver had not harmed Ramada.[79] Inclusion of these details would, arguably, have led the average reader to a nondefamatory interpretation of the report. In other words, the reader likely would not have concluded that Ramada was hiding something from shareholders if provided with a fuller account of Ramada's response. The claim of defamatory implication involving the financial statements would survive this final element of the test.

The effectiveness of the test can be explored further by applying it to another aspect of the Ramada case: the break-even estimate dispute. The implication here was that Ramada would spend more to operate the Tropicana than it would collect in revenues. First, the report must be considered as a whole, which means the break-even estimate must be considered in the context of a story about Ramada's apparently troubled entry into the casino gambling business.

It seems that strained interpretation is not at issue. It appears from the disputed passage that the reporters were trying to assess the business potential of the Tropicana, based on information obtained from their most credible sources. The assessment was that the Tropicana was not likely to break even.

The third prong of the test requires the implication to be an assertion of fact capable of verification, not a defamatory opinion. The criteria in Ollman are useful in determining the nature of this implication. Most important to this analysis is the

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[79] Ramada Inns v. Dow Jones & Co., 543 A.2d 313, 324 (Del.Super. 1987).

Ollman test's second element, which calls for consideration of the implication's verifiability.[80] The implication makes a prediction about Ramada's future business performance. Future events are, of course, incapable of verification. This indicates the implication is opinion rather than fact. Thus the disputed passage about the break-even estimates is protected opinion. The fourth part of the test for libel by implication need not be reached.

CONCLUSION

Libel by implication poses difficulties for plaintiffs and defendants. Courts that are reluctant to recognize it may fail to offer sufficient protection to reputation. However, courts that are over-zealous in their findings could threaten free speech rights by holding media defendants liable for strained, unintended or unforeseen innuendo.

Innuendo can take several forms. It can arise from suggestive language, the omission of facts, or a tortured interpretation of a report. Courts have not formulated a standard test for analyzing these cases. Some have applied a close reading of the disputed report, while others have offered alternative interpretations, doubted the newsworthiness of the report without the innuendo, or even refused to recognize it.

These case-by-case interpretations have led to a lack of uniformity in the treatment of libel by implication. The interests of plaintiffs and defendants would be served by the application of a uniform standard in these cases. This paper has offered such a test that attempts to balance concern for reputation against free speech rights.

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[80] Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984). Other elements of the test call for determination of whether the statement has a precise core of meaning and consideration of the context of the statement and the broader social setting in which it is made.

Press Rolls Over, Plays Dead in New Assaults on First Amendment Protections

by

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Press Rolls Over, Plays Dead in New Assaults on First Amendment Protections

Newspapers are facing a new test of their First Amendment guarantees with a series of legislative assaults that threaten to erode those constitutional freedoms through laws that impact the business side of the print media. A free press, separate from government intervention, was a goal from the time of the Founding Fathers.

Recent legislation that burdens the press through mandatory recycling laws, limitations to access of information and a new push to assess sales tax on daily newspapers point to new assaults on newspapers.

These latest statutes and court decisions in themselves may not point to an erosion of First Amendment freedoms but, taken in total, it may point to a new attitude toward the press.

Newspapers long have been diligent about preserving--and enhancing--their position concerning privileges extended to them via broad interpretations of the First Amendment.

While the Supreme Court never has accorded an actual privileged status to newspapers,[1] the print media and courts generally have agreed that reporting requires extra consideration to perform the task at hand--putting out a newspaper.

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[1] See Anthony Lewis, "A Preferred Position for Journalism?" 7 Hofstra Law Review 3 (1979), p. 595-627.

II. FIRST AMENDMENT OVERVIEW

The First Amendment protections have been expanded to cover more than the actual news gathering function. The "structural" model of the press has been taken into account when the courts have had to determine if legislation or ordinances were enacted with the intent or inevitable effect of harming the press. The approach provides a wide range of protections to newspapers.

> The press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news. As you can easily see, the stretch of this protection is theoretically endless. Any imposition of any kind on the press will in some measure affect its ability to perform protected functions.[2]

Direct assaults on those special considerations have resulted in a number of landmark court cases in the past, involving issues that ranged from protecting news sources,[3] to free press/fair trial issues,[4] to taxation.[5]

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[2] Address by William J. Brennan, 32 Rutgers Law Review 173 (1979), p. 177.

[3] See Branzburg v. Hayes, 408 U.S. 665 (1972).

[4] See Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980); and, Globe Newspaper Company v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982).

[5] See Grosjean v. American Press Co., 1 Med. L. Rptr. 2684, 297 U.S. 233 (1936); and, Minneapolis Star v. Minnesota Commissioner of Revenue, 9 Med. L. Rptr. 1369, 460 U.S. 575 (1983).

Situations that feature a judge issuing a gag order to stop newspapers from disseminating information or a special tax based on circulation figures have been easy to distinguish as newspaper-specific punitive actions just begging for remedy from a court. It is easy for a newspaper to rally around a case where one of its reporters is subpoenaed by a court to reveal sources and, in effect, becomes an extension of the law enforcement branch of government by supplying information that the police investigators could not glean.

More difficult are the issues that appear on the edge of First Amendment protection--those acts that are not direct assaults but rather nicks in the First Amendment armor.

What this paper will look at are instances where newspapers have been harmed in the Grosjean-sense[6] of the word by legislation that either has been unchallenged by newspapers or has been amended following pressure from newspaper groups. The Grosjean test, though no longer the test applied to newspaper cases since the 1983 Supreme Court decision in Minneapolis Star v. Minnesota Commissioner of Revenue, clearly determined that any statute that could eventually hinder the press in its operations would be constitutionally suspect.

In Minneapolis Star, it was quite clear that the business side of newspapers is to be treated as any other business. While it is fair to expect that newspapers, like other businesses, pay a fair amount of taxes (if the taxes are uniformly assessed to all businesses), the cold treatment accorded by Star does not take into consideration the impact of uniform laws.

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[6] The Grosjean test held that laws passed with the intent or potential effect of harming or hindering the press were invalid.

Statutes directed at either the editorial side or the business side, which indirectly affected the editorial side, were strictly scrutinized by courts. If elected officials were angered by the press, as was the case in Grosjean v. American Press Co. when Gov. Huey Long initiated legislation that was aimed at his antagonists--the New Orleans Times-Picayune--by singling out newspapers with a circulation of more than 20,000 copies daily as required to pay a license tax on 2 percent of its gross receipts. The Supreme Court saw through the words of the statute and went for the intent of it--to punish the Times-Picayune for its opposition to Long.

A more recent example of a tax that punishes publications was the focus of the 1987 Supreme Court ruling in Arkansas Writers' Project, Inc. v. Ragland.[7] The court struck down an Arkansas sales tax plan that provided exemptions based on the content of the publication. The court reaffirmed the doctrine that any statute or ruling in a newspaper matter must be content-neutral.

It is in that tradition that courts have maintained that a free press must be free of government attempts to silence or control it.

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[7] Arkansas Writers' Project v. Ragland, 13 Med. L. Rptr.

But as the 1980s prepared to bow out, several legislatures and courts have made rules that seem contrary to the former stance of protecting a free press from unnecessary restraints and financial burdens.

The net effect of the move to mandate that newspapers serve as recycling centers and use recycled newsprint, limitations to access of driver's license records in California, the imposition of sales tax on newspapers in Missouri and an attempt to quell telephone subscription/advertising sales via telephone in Oregon is the same: newspapers are not being given the special considerations that they once received both from courts and legislatures.

The concept of equal treatment of businesses is a noble one but the ultimate consequence may be of greater detriment to newspapers, by eventually affected the protected content, than a law that may affect a business dealing in commodities. The result is that the law may be uniform but the fit is bad because it may hinder the press function. It is in that final analysis that problems arise. While the legal remedy addresses the immediate problem at hand (a proposed tax measure), the newspaper industry instead looks at the final result--the impact the measure will have on the news side of the business.

Should these types of statutes keep cropping up, the result will be a chipping away at the fringes of First Amendment protection. Though they may be only little chips, the cumulative effect may result in a different definition of what privileges are covered by the somewhat vague "Press Clause."[8]

III. HISTORY

First Amendment newspaper law is a relatively new phenomenon, dating back only to 1931.[9] That initial lawsuit opened the courts to a flurry of media activity in the following 60 years. Each time newspapers were successful, the reach of First Amendment protection was extended a little further.

The Warren and Burger Supreme Courts, which set the tone for newspaper treatment during much of the 1960s and 1970s, provided for new and broader privileges due in part to their feeling that the press provided for "uninhibited, robust and wide-opened"[10] discussions of issues.

The print media found itself relatively free from the threat of prior restraint coming from Near v. Minnesota,[11] a position which was reaffirmed in cases that followed.

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[8] See David Anderson, "The Origins of the Press Clause," 30 UCLA Law Review 3 (1983), p. 455-541.

[9] Near v. Minnesota, 283 U.S. 697 (1931).

[10] New York Times v. Sullivan, 376 U.S. 254, 270 (1967).

[11] Near v. Minnesota, 283 U.S. 697 (1931).

While initially the Branzburg[12] decision would strike the casual observer as saying that the Supreme Court did not recognize a reporter's privilege to keep sources confidential, the court's opinion did open the door for state legislatures to provide relief through shield laws,[13] even though the court was unwilling to come up with a constitutional protection. The court said there was "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards."[14] The Court also established constitutional rules of libel,[15] separating public figures from private individuals,[16] who do not have as great a chance of access to the press to protect their reputations. Public figures, starting with the Sullivan v. New York Times case in 1964, had a higher burden of proof in libel actions against newspapers.[17]

Though newspapers always have been responsible for payment of general taxes, special privileges for the business side of newspapers too have evolved. Few states impose a sales tax on newspapers, mainly because of the difficulty in obtaining accurate counts on newspapers sold. Beyond that, it has generally been accepted that newspapers would not be subject to special taxation schemes aimed at the business side of a newspaper.[18]

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[12] Branzburg v. Hayes, 408 U.S. 665 (1972).

[13] Ibid., p. 681.

[14] Ibid.

[15] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[16] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[17] Public figures suing for libel must prove both falsity and actual malice. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

A period of more than 40 years elapsed between landmark newspaper taxation cases. Grosjean v. American Press Co.[19] was decided by the Supreme Court in 1936, setting the standard that any tax statute passed with the intent or potential of harming the press was invalid. The Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue[20] decision in 1983 changed the ball game, so to speak. The new test became that any law that provides "differential treatment" of the press is suspect and likely invalid.[21]

The change in orientation should be troublesome to newspapers. It is through differential treatment[22] that newspapers--unlike other businesses--have fulfilled their role of serving as proxy to the public[23] by investigating government, high-powered businesses and other issues that affect people's lives either directly or indirectly.

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[18] The Supreme Court ruled that a newspaper-specific tax "might well result in destroying both advertising and circulation." Grosjean v. American Press Co., 1 Med. L. Rptr. 2685, 2687 (1936).

[19] Ibid.

[20] Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 9 Med. L. Rptr. 1369 (1983).

[21] Ibid.

[22] Newspapers receive a number of special privileges that other businesses do not enjoy, including: favorable second class mailing rates established through the Postal Code, 39 U.S.C. 3626; Joint Operating Agreements, created by the Newspaper Preservation Act (15

Newspapers should be concerned with the change in focus. The Minneapolis Star decision in its statement of "differential treatment" allows for two different outcomes: first, all newspapers being treated badly as long as they are treated the same and, second, that laws apply as equally to a newspaper as to a plastic wrap manufacturer, even though their roles in society and their functions are different.

Once again, although an equal protection argument may be valid when comparing like businesses, arguing that a newspaper and a product manufacturer should be treated equally in all circumstances is absurd, as their roles and functions are different. Equal protection and treatment of the two would not affect the manufacturer, but would diminish the effectiveness of newspapers which, through the years, have relied on extra

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U.S.C. 1801-1804), that allows two newspapers to merge business operations without violating anti-trust laws in an effort to maintain two separate editorial voices in one community; and, minor-age newspaper carriers not being subject to child labor laws. The common thread is that each allows the business side of a newspaper to publish its news product more economically.

[23] The public is the beneficiary of information obtained in newspapers. Branzburg v. Hayes, 408 U.S. 665 (1972).

measures of protection to serve one of its more important roles, that of watchdog of the government.

Though the Minneapolis Star holding has not yet been used to take away any privileges that the press has enjoyed, the wording would allow for dismantling of many special considerations that have become nearly synonymous with news gathering or news dissemination.[24]

This is not to say that Minneapolis Star has not been employed in press decisions. But the decisions using Minneapolis Star have not yet hindered the press in those new applications.

Minneapolis Star was used as the test in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority[25] to uphold the right to place newsracks in commuter train stations, in Minnesota Newspaper Association v. Minneapolis[26] to eliminate a licensing plan for operators of news racks and in Arkansas Writers' Project v. Ragland[27] to abolish a tax scheme that exempted newspapers plus religious, professional, trade and sports journals from the tax plan but taxing all other magazines, including those of general interest. The continued validation of the Minneapolis Star test, however, would prove that there definitely is a change in attitude concerning press treatment that will be granted by the Supreme Court and, subsequently, lower courts and government. And examples of that change already are beginning to appear in scattered incidents across the nation.

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[24] A prime example would be the Newspaper Preservation Act (15 U.S.C. 1801-1804). Using the Minneapolis Star test that newspapers cannot be treated differently than other businesses, joint operating agreements--merging the business operations of two newspapers but maintaining separate editorial voices--would be viewed as different treatment than other businesses receive. And since that treatment is different, it would not permissible. Businesses that would try to merge operations would be in violation of existing anti-trust laws.

[25] Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d. 767, 774 (2d. Cir. 1984).

[26] Minnesota Newspaper Association v. Minneapolis, 9 Med. L. Rptr. 211.

IV. THE FIRST AMENDMENT EROSION BEGINS

Four pieces of legislation spawned in 1989 are of particular interest in the topic of eroding the First Amendment fringes. Each of the instances increases the financial burden on the business side of newspapers, thus impacting the editorial product. Even without government-imposed burdens, the increases in newsprint prices, increasing supply costs, rising wages and losses in advertising have wreaked havoc with newspaper income.

Two new state laws are mandating that newspapers use certain percentages of recycled newsprint or face financial penalties. Florida and Connecticut have enacted statutes that make newspapers more responsible for the state's ecological concerns.

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[27] Arkansas Writers' Project v. Ragland, 13 Med. L. Rptr. 2313.

Other states also are considering the possibility of similar laws.

Florida's Solid Waste Management Law[28] was signed into law on June 24, 1988, taking effect on Jan. 1, 1989. Newspapers played a very central part in the statute, with legislative fingers pointing at the print media as a business that adds to the waste stream through newsprint thrown in landfills.

Newspapers in Florida not only pay a 10 percent tax when purchasing virgin newsprint,[29] but also are required to serve as a recycling center drop-off site for newsprint.[30] Newspapers, however, have been granted a tax credit of "25 cents per ton of newsprint utilized in publications by their facility that have been returned and made available for recycling,''[31] as well as a tax credit of "10 cents per ton allowed against the fee obligation of each ton of recycled newsprint used in publication of products.''[32]

The Florida Senate estimated that the state would generate about $350,000 in revenue from the 10 cent assessment for use of non-recycled paper.[33] But the law also carries an additional threat to newspapers, setting specific guidelines for amounts of recycled paper to be used within a five-year period.

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[28] Solid Waste Management Law, Public Act 88-130, Florida. Signed into law June 24, 1988.

[29] Ibid., Section 71.1.

[30] Ibid., Section 71.4.

[31] Ibid., Section 71.5.

[32] Ibid., Section 71.2.

> If the (Department of Environmental Regulation) determines on (Oct. 1, 1992), by a preponderance of evidence, that newsprint sold within the state is being recycled at a rate of less than 50 percent of the quantity sold within the state, the product waste disposal fee on newsprint shall be increased to 50 cents per ton.[34]

The Florida recycling statute is written to place ecological controls on newspapers, tire dealers (to recycle rubber) and vending machine companies (aluminum cans), with no other businesses singled out in the recycling mandate. The legislation calls for a heightened awareness of recycling efforts at all state offices and schools but does not set guidelines for the purchase of recycled stationery and other paper products. Municipalities are encouraged to promote recycling centers within their corporation limits but are not required to purchase recycled paper or other materials.

Similar legislation in Connecticut passed on July 1, 1989 and will go into effect in 1993.[35] The Connecticut resolution embraced a spirit of cooperation between government and newspapers in the recycling effort, contrasted to the heavily punitive nature of the Florida statute. However, the effect in Connecticut is the same as in Florida: newspapers are being compelled to become leaders in the recycling effort.

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[33] Summary of Conference Committee Amendments to CS/CS/SB1192, Solid Waste Management Law, Committee on Natural Resources & Conservation, Florida Senate, April 1988, p. 14.

[34] Solid Waste Management Law, Public Act 88-130, Section 71.3, Florida. Signed into law June 24, 1988.

[35] An Act Concerning Reduction of Packaging Material and Disposable Products. Connecticut Public Act 89-385. Enacted October 1, 1989.

The Connecticut law alarmingly also set up differential treatment of out-of-state newspapers based on circulation regarding compliance with recycling rules. The Connecticut newsprint recycling act applies only to "newspapers published and distributed in Connecticut or published out-of-state with an average in-state daily circulation of more than 40,000."[36] Basing any legislation on circulation makes the statute constitutionally suspect, with explanations that date back to the Grosjean case. Using circulation figures is a prior restraint, as the net effect may be that out-of-state newspapers limit their circulation to fall under the ceiling that causes a restrictive rule to come into play. The idea of pushing away alternative voices through restrictive ordinances that attack the circulation department, rather than the clearly protected editorial department, came into play in the Lakewood v. Plain Dealer Publishing Co. The Supreme Court in that newsrack case noted:

> The danger giving rise to the First Amendment inquiry is that the government is silencing or restraining a channel of speech; we ask whether some interest unrelated to

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[36] Ibid., Section 4 (a).

> speech justifies this silence. To put it another way, the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[37]

The _Grosjean_ tax plan also was based on circulation, and those guidelines particularly rankled the Supreme Court.

> The form in which the tax is imposed is in itself suspicious.. . It is measured alone by circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.[38]

Additionally, the new Connecticut law calls for the establishment of a Newsprint Recycling Task Force,[39] comprised of various appointed and elected officials plus leaders from the recycling industry. Two newspaper people also will sit on the panel: a member of the Connecticut Daily Newspaper Association appointed by the House majority leader and a member of a weekly newspaper appointed by the Senate majority leader.[40]

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[37] _Lakewood v. Plain Dealer Publishing Co._, 15 Med. L. Rptr. 1481, 1487 (1988).

[38] _Grosjean v. American Press Co._, 1 Med. L. Rptr. 2685, 2691 (1936).

[39] _An Act Concerning Reduction of Packaging Material and Disposable Products_, Section 5 (a). Connecticut Public Act 89-385. Enacted October 1, 1989.

[40] Ibid., Section 5 (b).

To escape penalty, newspapers must use 20 percent recycled newsprint in 1993.[41] The percentage increases through the decade, with newspapers to be at 90 percent recycled paper by 1998[42] to meet the requirements.

Newspaper publishers will be granted recycling penalty exemptions if they can certify they were unable to obtain enough recycled newsprint at a price comparable to virgin newsprint or within a reasonable time.

> The certification must contain the reason for not using recycled content newsprint and the name, address and telephone number of each producer contacted. A certification is in good faith if the publisher submits proof that he contacted each producer that offered to sell him recycled content newspaper within 18 months of certification.[43]

While ecological concerns are important, these two pieces of legislation put into question the standard of governmental involvement in a First Amendment business. Government since 1983 has had to meet a compelling interest test when enforcing newspaper-specific laws. Justice Sandra Day O'Connor, in her majority opinion in Minneapolis Star, noted that, "A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[44] Raising tax money is a substantial government interest but not a compelling one, as noted in the Ragland decision, because the state has other alternatives to raise those revenues.[45] Those alternatives include tax schemes that would meet the demands of the Minneapolis Star test that tax plans be of general application and not aimed at specific industries.

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[41] Ibid., Section 4 (a).

[42] Ibid.

[43] Ibid., Section 4 (c).

As the Florida and Connecticut recycling laws affect only or mainly newspapers, with no effort being made toward mandatory across-the-board recycling, these instances qualify as newspaper-specific acts. More precisely, these are exactly the types of legislation that Minneapolis Star is aimed against.

Though Minneapolis Star concerns itself with taxation of the press, the general principle of uniform application of laws has been used by other courts when deciding newspaper issues, including licensing of the press[46] and newsrack cases.[47]

In the Minnesota Newspaper Association v. Minneapolis case, the Supreme Court acknowledged that it was using a tax case precedent to decide another type of newspaper regulation. But it said the cases were "quite different factually, but conceptually akin."[48] The court validated the general concept of no differential treatment of the press, expressing that the philosophy of Minneapolis Star indeed transcended tax matters to any matter that affects First Amendment-protected newspapers.

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[44] Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 9 Med. L. Rptr. 1369, 1372 (1983).

[45] Arkansas Writers' Project v. Ragland, 13 Med. L. Rptr. 2313, 2314 (1987).

[46] Associated Press v. NLRB, 1 Med. L. Rptr. 2689 (1937).

[47] Minnesota Newspaper Association v. Minneapolis, 9 Med. L. Rptr. 2117 (1983).

There is no indication that mandatory newsprint recycling in this year or in this decade is required to forestall an imminent threat of ecological disaster. If such a danger were imminent, then government would have a compelling interest to mandate newsprint recycling. And, if that danger were imminent, the legislatures should have required recycling at all levels of government and by all businesses operating within those states rather than singling out newspapers to carry the burden of saving the environment.

The Florida requirement of newspapers serving as recycling drop-off centers is quite an encumbrance and has the intent of placing a financial burden on newspapers because it uses newsprint to transmit its message.

The most obvious burden is disposing of the newsprint. Currently mills are paying $10 to $20 per ton for newsprint but that figure is deceptive. The price paid does not take into account the staff time to prepare newsprint for the recycling mill or other fixed costs, such as storage and transportation.

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[48] Ibid., p.2122.

Steve Kratzer, of the Michigan Department of Natural Resources' resource recovery division, explained that the cost of recycling goes up every time another intermediary handles it. The newspaper that collects the newsprint would either use staff to bale the paper or pay another company to do that. From there, the newsprint goes to a broker who finds the mill to purchase the newsprint. The newspaper also would have to provide transportation for the newsprint either to the broker or to the mill.

"The newsprint would have to be sorted according to inking quality and would have to rid the accumulated newspapers from contaminants, such as the advertising circulars since glossy enamel stock is not recyclable. By the time you do that and pay for someone to bale the newsprint, ship and process it, you're quickly dealing in negative numbers,'' Kratzer explained.[49]

Newspapers then are forced into a new business venture that provides little or no profit, but is entered into only to stave off penalties from the government. The same message could be published on 100 percent cotton bond paper, however, and the newspaper would not be saddled with the restrictive recycling mandates. Instead, because newspapers use newsprint, they are facing government penalties for the method by which they deliver their message.

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[49] Steve Kratzer, Michigan Department of Natural Resources, resource recovery division, telephone interview, March 1990.

The Connecticut measure is disturbing in that newspaper representatives will be politically appointed to serve on a recycling policy for newspapers. These media representatives, along with elected government officials, are working on a policy that includes a penalty structure. It seems incongruous that newspapers would be an active participant in concocting regulations that would add to the cost of the newspaper business.

Newspaper recycling is a much ballyhooed venture, already mandated by Florida and Connecticut, proposed in New Jersey and voluntarily embraced by New York through that state's press council. The Michigan Press Association also is working on a voluntary recycling agreement, though it is getting some governmental prodding.

A question that has not been addressed is the added financial burden on newspapers, as well as the very basic question of where are newspapers going to purchase the quantity of recycled newsprint required.

Presently, there are only eight recycling paper mills in the United States.[50] Recycling facilities already are overwhelmed by the amount of newsprint coming in for recycling, with the new legislation threatening to further overburden the existing plants.[51] The legislation does not provide any financial incentives for new mills to open and prosper.

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[50] John Holusha. "Old Newspapers Hit a Logjam." New York Times. September 10, 1989, p. 4F.

Industry analysts have estimated that it costs approximately $400 million to open a recycling mill,[52] though a number of paper producers "are considering adding de-inking equipment, at a cost of $20 million to $30 million a mill, to blend in some recycled material."[53]

The limited number of recycling mills already in operation, plus the high start-up cost of a new facility, will make it difficult for newspapers in coming years to acquire the vast amounts of newsprint needed to publish, thus increasing the financial burden on the newspapers.

Newspapers may be in noncompliance with the state laws, not because they are choosing to ignore such burdensome measures but rather because there may be inadequate supplies of recycled newsprint to meet the needs. Newspapers then would be punished for putting their messages on virgin newsprint. The recycling mandates, out of fairness, should include exemptions since the demand for recycled newsprint will be higher than the supply, based on the few recycling mills that presently are in operation.

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[51] Ibid.

[52] Ibid.

[53] Ibid.

The differential treatment based on getting out a protected First Amendment message should be enough to bring into play the Minneapolis Star[54] test, but the rigorous strictures placed on getting out a message also could be made into an argument that mandating recycling is a press license in disguise. If a newspaper wishes to continue to publish, it must have recycled newsprint, according to the government rules. But those rules now become a license with which to do First Amendment business.

The Supreme Court called that situation an unconstitutional condition in its analysis, though it did not use that phrase.

If a newspaper is required to serve as a recycling center in order to continue publishing that newspaper without facing weighty tax penalties, the government has imposed a burdensome unconstitutional condition. And the situation then becomes analogous to the FCC v. League of Women Voters[55] case where the "cost" of receiving governmental funding was to yield the First Amendment right to editorialize. The Supreme Court called that situation an unconstitutional condition in its analysis, though it did not use that phrase.

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[54] "(T)he Court concludes that differential treatment . . . requires that (a statute) be found presumptively unconstitutional and declared invalid unless the State asserts a counterbalancing interest of compelling importance." Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 9 Med. L. Rptr. 1369, 1380 (1983).

[55] FCC v. League of Women Voters, 10 Med. L. Rptr. 1937 (1984).

At the heart of the issue is that a protected First Amendment enterprise can have no strings attached to its freedoms. The concept is that a media organization cannot be made to give up[56]--or the reverse, be required to do[57]--something in order to continue serving its function.

One of the press' functions is to participate in the marketplace of ideas by presenting opinions that open current situations to discussion and debate. The FCC in its mandate attacked the very role and function of media. The Supreme Court said the FCC ruling was way out of line because editorials are "core speech" and that right is something that cannot be overridden by FCC regulation. Now newspapers are being told that they must provide recycling services as an ancillary business operation. The penalty for newspapers that do not go along with the government's new directive for newsprint recycling is a punitive taxation scheme.

The *Minneapolis Star*[58] test, if applied to recycling mandates rather than taxation schemes, would call the state laws into question constitutionally, as the requirements "place so heavy a burden on First Amendment interests"[59] that they could not be counter-balanced unless the state asserted an "interest of compelling importance"[60]--that the end result could not be achieved without the differential recycling laws.

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[56] *Hannegan v. Esquire*, 1 Med. L. Rptr. 2292 (1946).

[57] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[58] Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 9 Med. L. Rptr. 1369 (1983).

More alarming is the fact that not one newspaper in Florida or Connecticut has taken these recycling laws to court to test their constitutionality.

Other newspapers have been slow to react to the latest attempted abridgement of the business side of the industry. Editor & Publisher did not editorialize against the mandatory recycling laws until its Nov. 11, 1989 edition:

> Newspaper publishers are very concerned about the problems of recycling newsprint and are determined to do their part in solving the problem of waste paper, as many E&P stories have reported recently. However, they are up against state legislatures that insist on forcing publishers to use a mandated amount of recycled paper when they do not understand the supply picture.[61]

Unfortunately, the editorial stand took an incorrect tack. The newspaper industry should more appropriately employ a First Amendment argument rather than spouting supply-and-demand theory. The issue at stake is potentially greater than a 10-cent-per-ton tax. If mandatory recycling goes unchallenged, that apathy may pave the way for legislators to more bravely adopt increased and broader laws that have the potential of harming newspapers. While mandatory recycling may be the issue that riles newspapers first, there have been other assaults on the press recently that have gone largely unchronicled.

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[59] Ibid., p. 1380.

[60] Ibid.

[61] "Don't mandate recycling." Editor & Publisher. November 11, 1989, p. 6.

Oregon was ready to enact an all-encompassing Senate Bill 266[62] to limit telephone solicitations. Under the bill, all telephone solicitation companies would be required to register with the Department of Justice,[63] pay a filing fee of $400,[64] plus comply with a list of guidelines.[65]

Before the bill was enacted in June 1989, a number of Oregon newspaper publishers and agencies had protested the proposal because of its effect on circulation and advertising solicitations. On the eve of passage, the newspaper lobby succeeded in having two subsections of the bill eliminated. The stricken passages include: "a person primarily soliciting the sale of a subscription to or advertising in a newspaper of general circulation''[66] and "a person generally soliciting the sale of a magazine or periodical, or contractual plans, including book or record clubs."[67]

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[62] Enrolled Senate Bill 266, Oregon, 65th Legislative Assembly, passed June 23, 1989.

[63] Ibid., Section 3(1).

[64] Ibid., Section 3(2).

[65] Ibid., Section 7.

Access to driver's license information by California reporters was restricted in October 1989 when the state's Department of Motor Vehicles sought a higher privacy status for its records. Newspaper organizations had asked for an exemption but it was not included in the legislation.

Assembly Bill 1779 became law and made it more difficult to obtain home addresses from driver's license records, which newspapers long had used as one method of tracking down potential news sources.

A state official had told the California Newspaper Publishers Association that the press would receive special treatment "but it was noted it was only an oral directive and could be superseded by (the) bill."[68]

The California law calls for a mandatory 10-day waiting period for any information gleaned from driver's records.[69] "These procedures shall also provide for notification to the person to whom the information primarily relates, as to what information was provided and to whom it was provided."[70]

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[66] Ibid., Section 2(2.f).

[67] Ibid., Section 2(2.g).

[68] M.L. Stein. "Access to drivers' records limited." Editor & Publisher. September 23, 1989, p. 28.

[69] Assembly Bill 1779 to amend Section 1798.26 of the Civil Code. California. Passed by Assembly September 13, 1989.

Newspapers--along with insurance companies and other commercial concerns--could be licensed by the state to gain driver license information under the legislation.

> The department shall establish a commercial requester account when it determines that the applicant has a legitimate business need for the information requested and when the applicant files a bond in the amount of $50,000 and pays a $250 filing fee.[71]

Again, the issue of "licensing" the press should be a particularly abhorrent one. There is a long history of opposition to any type of licensing of the press that dates back to Colonial times. "(A) multiple or periodic licensing requirement is sufficiently threatening to invite judicial concern."[72]

Another problem with the law is the discretion the government holds in determining what is a "legitimate business need," which is not defined in the act. The 10-day waiting period also penalizes newspapers because news has a short shelf-life and the long period would frequently eliminate the person being sought as a source, thereby effectively serving as a prior restraint.[73] The National Newspaper Association, comprised of community newspapers across the country, has noticed an increase in legislation that adversely affects the print media. In its annual report, the association pointed to proposed legislation that would adversely affect the press, including: sales taxes in various New England states;[74] contract bulk mail discounts[75] that would make bulk mail advertising more financially attractive than newspaper advertising; and, proposed state bills that would allow review or editing of insurance ads prior to publication.[76]

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[70] Ibid.

[71] Ibid., Section 1810.2(c).

[72] Lakewood v. Plain Dealer Publishing Co., 15 Med. L. Rptr. 1481, 1485 (1988).

V. THE BOTTOM LINE

"Businesses don't pay taxes" is a truism that applies to all companies, including newspapers. Higher costs that come either from increased prices of component parts or taxation are passed along to the consumer. Rather than absorbing the additional costs, the increases are passed on in a different manner. If the costs cannot be wholly absorbed, the product is affected in some manner, as the company tries to produce a similar type of product at a lower cost.

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[73] "Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1970).

[74] National Newspaper Association 1989 Annual Report. Washington, D.C., p. 4.

[75] Ibid., p. 5.

[76] Ibid.

Whether it comes from the cost of operating a recycling center, using higher-priced recycled newsprint, higher taxes, posting bonds or filing registration fees, the higher cost of doing business also affects newspapers. Justice O'Connor, in the Minneapolis Star decision, acknowledged that burdens on the business side eventually may produce devastating effects on the news side.

In the current economic climate, newspapers would lean more towards lowering unit costs than to pass on to consumers the full impact of the measures that previously were mentioned. Newspaper advertising linage was decreasing nationwide during 1989,[77] so raising advertising rates would not be a wise--or perhaps even successful--way of increasing revenues. Circulation is the other revenue-producing division of a newspaper and there is a limit to what the market will bear before subscribers halt buying newspapers, especially since readership has been declining since 1950. Household penetration of daily newspapers was 1.32 newspapers per household in 1950 but that number dropped to 1.0 by 1980 and was down to .77 by 1985.[78]

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[77] Andrew Radolf. "Newspaper Financial Reports." Editor & Publisher. November 11, 1989, p. 16.

[78] Leo Bogart. Press and Public: Who Reads What, When, Where and Why in American Newspapers. 2nd. edition. Hillsdale, New Jersey: Lawrence Erlbaum Associates (1989), p. 16.

Why would the editorial side bear the brunt of budget cuts? Call it tradition. An analogous situation occurred in 1973 when there was a newsprint shortage and newspapers were forced to cut back their product. The limited resource this time was the newsprint and not cash, which would be the case if a newspaper is hit with an increased cost either through taxation or mandatory recycling.

To stretch scarce newsprint in 1973 the majority of newspapers in a survey conducted by the Associated Press Managing Editors found that newspaper publishers cut the amount of space devoted to editorial content, or newshole.

Sixty-three percent of the newspapers opted to cutback on newshole, while 9 percent cut advertising and "a few" cut circulation.[79]

The difference in this analogy, though, is that a newsprint shortage is a condition of the market, which is a natural phenomena. The recycling mandates and ensuing shortage of available recycled newsprint is a result of a governmental action. Because the government is artificially imposing these conditions, it could change the scenario a bit so the newspapers are not so heavily penalized. By basing recycling guidelines on the amount of newsprint available or by providing tax abatements to paper mills that convert to making recycled newsprint, the government is lessening the restrictive climate on newspapers.

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[79] Ibid., p. 53.

While other industries more easily can pass off new costs to the consumer, newspapers have shown a resistance to price increases. The price for individual copies of a newspapers are relatively static, with decades passing before consumers experience price increases.

Advertising fees also increase rarely because there is a ceiling as to what an advertiser will pay. With that is the fact that an advertiser has other media to do business with, including radio, broadcast television, cable television or the bulk mail (third class postage) advertising circulars.

> Newspaper revenues are derived from two constituents: advertisers, who provide 70 percent to 80 percent of revenue, and subscribers, who add the remaining 20 percent to 30 percent. Smaller newspapers tend more to the 70/30 advertising to circulation ratio, while the big city papers are more dependent on advertising revenue at about 80/20.[80]

Since advertising provides the lion's share of newspaper income, it is quite reasonable to suggest that when there is a period of advertising linage decline, newspaper profits are impacted.

Weakened advertising sales, belt-tightening programs already in place, and the added burden of a new tax or a new government

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[80] Benjamin Compaine. The Newspaper Industry in the 1980s: An Assessment of Economics and Technology. White Plains, New York: Knowledge Industry Publications, Inc. (1980), p. 100.

[illegible]on further harms a newspaper's profitability and, if c[illegible]ons become severe enough, ultimately the newspaper's viability. It is in this worst case scenario that the importance of including all business divisions under the umbrella of First Amendment protection is most noticeable. If a penalty is so severe that a newspaper dies, the net result of the burdensome legislation is to have silenced an editorial voice.

Justice O'Connor was quite correct in her statement that burdensome business conditions do affect the editorial side of the newspaper business. Those effects are more evident when a newspaper is forced to scale down its operation to keep the business afloat.

"Cost control" is a polite way to say "cutting back costs." Since those who work in advertising bring in revenue, it would not be a logical choice to start with cutbacks in personnel or related costs from that division of the newspaper. The department that is most labor intensive and does not visibly bring in revenue is the news side, so it usually feels the brunt of cost reducing schemes.

One example of "cost control" comes from the Honolulu Star-Bulletin. When it was purchased by Gannett in 1972, the parent company was not satisfied with the profit margin and initiated changes.

> An evaluation of the changes made at the paper after Gannett came in noted that two reporters, including the Washington correspondent, were fired; 12 columns . . . were eliminated, as were two comic strips; the Copley News Service was cancelled; a

> final edition was cancelled. Gannett brought in a new publisher, who told reporters that the cuts were needed for economic reasons and that the Honolulu paper was fourth from the bottom in year-to-year revenue improvement in the Gannett chain.[81]

The Minneapolis Star, which folded in 1982, suffered a similar fate. When its afternoon edition was losing circulation to the competing Tribune, the Star owners experimented with the editorial content, rather than waging a war on other fronts. Cowles Media Co. opted to present wire service articles that were "magazine-style feature take-outs that sometimes ran to many thousands of words."[82]

Using wire service copy is a less expensive option than using staff resources. News reporters had been laid off to reduce the labor cost in the editorial department. The newspaper had abandoned covering city council news, speeches and news conferences in favor of the feature format. The result was that readers looked to the other paper for news and what was intended to save the newspaper served as the final nails in the coffin.

The changes made by Gannett in the Honolulu Star-Bulletin, much like the plan of the Minneapolis Star owners, affected the editorial product, not the revenue-producing divisions of advertising or circulation. This appears to be a general modus operandi to achieve increased revenue while cutting costs.

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[81] Robert Bishop. "The Rush to Chain Ownership." Columbia Journalism Review. November/December 1972, p. 21.

[82] Conrad C. Fink. Strategic Newspaper Management. New York: Random House (1988), p. 136.

Labor costs in the editorial department comprise 42.3 percent of costs for a 50,000 circulation paper.[83] With fewer reporters on the payroll, the media company can reduce the newshole of the paper, which presents another major savings.

Newsprint accounts for 15 to 16 percent of the total budget of small dailies and about 33 percent for large papers. By cutting back newshole, a newspaper company not only reduces its need for editorial staff but also for newsprint.

> "A 1 percent reduction in newsprint tonnage can increase profits up to 14 percent for a typical newspaper."[84]

A decade ago, costs were saved by computerizing print shop operations. Typesetters were needed in fewer numbers once computer terminals were supplied to reporters and editors. As we know, those savings are now complete, with state-of-the-art equipment and the elimination of scores of printing jobs. Those same economies cannot be realized in the labor-intensive editorial departments without, in the end, affecting the product, as previous examples have shown.

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[83] Ibid., p. 77.

[84] Ibid., p. 78.

Even newspapers that maintain the same number of editorial employees today as they did five or 10 years ago have not held costs because of increases in pay and benefits.

The only other option that remains is to reduce the amount of newshole (non-advertising space). The national average is approximately 45 percent newshole and 55 percent advertising, through the range is from 23 percent to 74 percent newshole.[85]

For newspapers at the 45 percent mark, reducing newshole to 41 percent would result in higher revenue without eliminating any other costs. Should the smaller newshole become the standard, there would be less total inches in the newspaper that needs to be filled by the editorial staff, which would mean that reducing the number of reporters would not be so noticeable.

The loser in this scenario, of course, is the reader. The average reader probably would not notice a slight shift in newshole, but the end result would be that the reader is receiving less information, not because there is less news but because a chain of events prompted cost-saving maneuvers. But the fact remains that the readers would be learning less about what is happening in the world around them, which would affect newspapers' role as a major player in the marketplace of ideas.

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[85] Dan Drew and G. Cleveland Wilhoit. "Newshole Allocation Policies of American Daily Newspapers." 53 Journalism Quarterly 3 (1976), p. 434-440.

V. CONCLUSION

Legal scholars[86] generally believe that the pendulum that swung to provide increased press freedoms during the 1960s, 1970s and 1980s has stopped in dead center. Scores of Supreme Court decisions before Minneapolis Star hailed the press as the watchdog of the government and proxy to the public, thereby warranting the expansive decisions in libel,[87] free press/fair trial[88] and journalist's privilege[89] cases.

With the Minneapolis Star decision warning against "differential treatment" for newspapers, a different attitude has emerged.

More disturbing, the differential treatment argument that was the core of the Minneapolis Star decision does not come into play with the legislative moves to mandate recycling in two states. The newspapers are not being treated equally with other businesses when it is only the newspapers that are required to serve as recyclers while other businesses are not.

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[86] See, Leila Sadat-Keeling, "Constitutional Law--Supreme Court Finds First Amendment a Barrier to Taxation of the Press," 58 Tulane L. Rev. 1073-89 (March 1984); Randall Bezanson, "Political Agnosticism, Editorial Freedom and Government Neutrality Toward the Press: Observations on Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue," 72 Iowa L. Rev. 1359-75 (July 1987); and, "Non-general Schemes of Taxation Violate First Amendment Free Press Clause," 89 Dickinson L. Rev. 1 (Fall 1984), p. 261-272.

[87] New York Times v. Sullivan, 376 U.S. 254 (1964).

[88] Nebraska Press Association v. Stuart, 1 Med. L. Rptr. 1059 (1976) and Richmond Newspapers, Inc. v. Virginia, 6 Med. L. Rptr. 1833 (1980).

[89] Branzburg v. Hayes, 408 U.S. 665 (1972). Though the reporter lost in this case, the Supreme Court did open the door for state legislatures to enact state "shield" lawyers to protect the reporters. The scope of the protection varies from state to state.

It would appear that the brunt of the recycling efforts have fallen upon the newspapers. Recycling centers do accept items other than newsprint (corrugated cardboard, certain types of plastics, glass, metals, batteries and used motor oil) but that issue was not raised in the enabling legislations.

The newspapers have accepted these two pieces of legislation without flinching--and without thinking of the long range ramifications. The government has opened the door to burdensome legislation aimed at the press. Newspapers naively may be looking at these laws as a one-shot deal that addresses a current social problem or feel it would be wrong to challenge a recycling mandate because they have editorially endorsed the concept of recycling waste.

Newspaper editorials may urge recycling; they can't mandate it. Newspapers may urge readers to voluntarily participate in the program as a responsible action. The government, however, did not give newspapers adequate time to voluntarily enter the recycling program; instead, it mandated recycling laws.

But not a single newspaper waved the banner of First Amendment protection against newspaper-specific laws that hinder the press financially. Connecticut even has managed to make government and newspapers "strange bedfellows" in the task of arriving at newsprint recycling regulations and penalties--apparently without a raised legal eyebrow in that unlikely partnership.

Because newspapers were singled out in those two statutes, it would seem that the newspapers should--or would--challenge the constitutionality and allow a court, rather than elected officials, to decide whether there is "differential treatment" in the legislation that would bring the laws into question.

> It is a deep tradition in First Amendment law that government may not escape scrutiny of its attempts to suppress speech merely by labeling its actions as neutral regulations; it is the operation and effect of government action, not its form, that matters.[90]

The Supreme Court has invited newspapers to question legislation. Even though the newspaper lost its case, the judge made it quite clear in the Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations[91] decision that newspapers should let courts decide whether First Amendment rights are being abridged. Even if the legislation does not have the affect of immediately disabling a newspaper, the judge pointed out that First Amendment abridgements may be very subtle.

> (I)t is important to identify with some care the nature of the alleged abridgement. This is not a case in which the challenged law arguably disables the press by undermining

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[90] Near v. Minnesota, 283 U.S. 697, 708 (1931).

[91] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 93 S. Ct. 2553 (1973).

> its institutional viability. Yet the Court has recognized on several occasions the special institutional needs of a vigorous press.[92]

But, to paraphrase, "you can lead a newspaper to a courtroom, but you can't make it sue." The passiveness displayed by Florida and Connecticut newspapers is surprising, considering the track record of the nation's print media, which has initiated a wealth of lawsuits claiming one action or another violated First Amendment guarantees.

The newspaper recycling acts violate the rules of Minneapolis Star because of the "differential treatment" of businesses. The states of Florida and Connecticut are making recycling demands on newspapers that other businesses are not being forced to comply with, either at all or to a lesser degree. The Florida statute does require some other businesses to recycle their materials, but not to the extent that newspapers do, nor must they become public recycling centers. The Connecticut statute is a newsprint recycling law, which limits its application. However, First Amendment companies are those that use newsprint most and should consider this a newspaper-specific rule.

Frame the regulation in the Minneapolis Star argument, throw in a citation from Grosjean v. American Press Co. and from Near v. Minnesota, and a media attorney would have a suit that reads like a First Amendment best seller. But that has not been the case.

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[92] Ibid., p. 2557.

While a newspaper may feel a moral obligation to eliminate used newsprint from the waste stream and to use recycled newsprint in its operation, the newspaper should do so voluntarily. A newspaper could challenge the constitutionality of a statute while, at the same time, incorporating recycling policies within the organization.

The privacy issue in California seems like it is ripe for newspaper action because of the abhorrence the Courts have expressed for any action that even faintly resembles a prior restraint. Cutting off a source of information is at the heart of a restraint,[93] where a newspaper cannot even begin its news gathering tasks without such basic information.

A verbal agreement from a state official that newspapers will be allowed access even with the law in place is no reassurance. Verbal agreements generally aren't worth the paper on which they're not written. And, without guidelines or regulations, there is a risk that officials will use unbridled discretion in picking and choosing which newspapers will have access, and which will not. This in itself is a First Amendment violation.

The Supreme Court, in its 1988 Lakewood v. Plain Dealer Publishing Co., clearly stated that when government officials are given discretion by an ordinance or statute to pick and choose which media companies are given access either to newsrack location or other methods of fulfilling their purpose, the rule violates the First Amendment.

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[93] U.S. v. Poindexter, 17 Med. L. Rptr. 1459 (1989).

> "When a licensing statute vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without first submitting to the licensing process. Such a statute constitutes a prior restraint and may result in censorship."[94]

The Court added that a newspaper might be intimidated into censoring its own message to avoid the loss of a permit and that such broad discretionary powers for government officials could be used by those in office to punish the content of the publication though, without clearly written rules, would be difficult to detect or review.

The solicitation law in Oregon was a narrow escape. The Oregon legislature apparently forgot that newspapers use the telephone to transact business and that legislation limiting telephone solicitation would harm newspapers. The law might have been enacted in its original form had newspapers of that state not reminded the officials of the role telephones play in soliciting both newspaper advertising and subscriptions.

Reminding legislatures of newspaper interests may be the key. Maybe the press in the past had reminded legislatures of its existence, which resulted in fewer laws enacted that hindered the press. Potential harmful statutes were stricken from the state regulatory schemes once newspapers initiated robust and vigorous lobbying efforts or lawsuits. In any event, it is up to the press to safeguard its own rights and to raise doubts about questionable legislation.

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[94] Lakewood v. Plain Dealer Publishing Co., 15 Med. L. Rptr. 1481 (1988).

Traditionally government has had to prove it had a strong interest when treating newspapers differently than other businesses. Strict scrutiny is applied because of the potential impact of laws on editorial content and other press freedoms.

Recycling and privacy are substantial interests but the governments involved here must show--and have not shown--a compelling interest to override First Amendment guarantees. And, quite unfortunately, the press has not asked that a compelling interest be proven.

Retraction: Analysis and Comments

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University of Minnesota/University of South Alabama

A paper presented to the annual convention of the Association for Education in Journalism and Mass Communication, Minneapolis, Minn., August 1990

> This Section establishes, as an absolute prerequisite to the maintenance of any suit for defamation, that the plaintiff first demand a retraction or opportunity to reply, and that such demand be refused by the defendant. The rationale for this Section is that the simplest, most efficient remedy for defamation is a prompt and reasonable retraction and reply.[1]

This statement is from a recent proposal to use retraction as a way to mitigate damages when one member of society has been defamed by another. The Annenberg study involved eleven legal experts and scholars, and the retraction section of the report is based on the belief that the main goal of legal protections for defamation should be clearing the reputation of the defamed person.[2]

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[1] Proposal for the Reform of Libel Law: The report of the Libel Reform Project of the Annenberg Washington Program, Washington: The Annenberg Washington Program in Communications Policy Studies of Northwestern University 20 (1988)

[2] The Libel Reform Project of the Annenberg Washington Program included Rodney A. Smolla, project director and professor of constitutional law at the College of William and Mary; Sandra S. Baron, managing general attorney for Law Department of the National Broadcasting Company, Inc.; Bruce E. Fein, attorney and general counsel for the Federal Communications Commission 1983-84; Lois G. Forer, retired judge of the Court of Common Pleas in Philadelphia and author of A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment; Samuel E. Klein, attorney and frequent lecturer on communications law, Philadelphia; Anthony Lewis, New York Times Columnist and Harvard Law School graduate;Roslyn A. Mazer, First Amendment attorney, Washington; Chad E. Milton, attorney, general counsel for Media/Professional Insurance, Inc. and former journalist; Anthony S. Murray, attorney with the U.S. Department of Justice, Civil Rights Division, who participated in the Annenberg project as a private citizen with expertise in the libel area; Herbert Schmertz, president of a public affairs counseling company in New York and former member of the American Arbitration Association; and Richard M. Schmidt Jr., communications law attorney, Washington.

Other recent studies on reform of libel law, such as the Iowa Libel Project,[3] have addressed the importance of retractions in satisfying the plaintiff and arresting damages to the plaintiff's reputation by making the truth available to those who originally received the defamatory remarks.

The concept of retraction as a solution to problems created by defamatory statements has a long history. The idea is rooted in an understanding of human nature and allows speakers or publishers to make honest errors in fact or judgment. The person making the incorrect, misleading or inaccurate statement can rectify the error by telling the persons who heard the statement that he has learned differently, has thought the idea through more thoroughly and has come to different conclusions or has recanted the implication of his words.

As a legal concept in libel and slander, retraction has several purposes. The most philosophical goal is the assurance that the "public" which heard the erroneous or unwise statement be given the corrected facts so that in the end truth will win out in the debate of ideas. Based on Milton's comments in the Aeropagetica, the idea of a multitude of voices and diversity of information creating a stage for truth fits well into this concept. A retraction adds information so hearers can determine for themselves what truth is. A more practical goal of retraction is the limitation of damage to the reputation of the individual. If the information is corrected before word spreads to others or has time to become ingrained in the image society has of the individual, there is less likelihood of permanent damage to the reputation and future economic well-being of the individual.

Although retraction has existed as a concept throughout American legal history, its importance in mitigation of damages has been inconsistent among states and periods of time. But the logic of allowing retractions to mitigate damages is sound, and statutory attempts to provide quick, efficient, inexpensive vindication of reputation for the plaintiff through retraction continue to be debated. The Annenberg Proposal calls for a uniform federal statute which allows a retraction to serve as a complete bar to libel litigation in all cases of defamation. The Iowa Libel Project[4] includes retractions as part of an alternative dispute resolution system where the parties negotiate acceptable solutions to the problem without going to court.

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[3] For a report on the Iowa study, see Bezanson, Randall; Cranberg, Gilbert; and Soloski, John. Libel Law and the Press: Myth and Reality, New York: Free Press, 1987.

This paper will look at how retraction has related to libel and slander in the common and statutory law and make suggestions for a model retraction statute to balance the rights of the individual with protection of freedom of speech.

The first section of the paper defines the concept as used in the common law. The second section looks at the variety of statutes which exist in individual states. And the third section identifies elements of a useful retraction statute, evaluates the necessary elements from plaintiffs' and defendants' perspectives and suggests wording for such a statute.

Common Law Retraction

Retraction[5] has been a part of the common law of libel for centuries. It came to American law from the English law,[6] and cases recorded in the United States as early as

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[4] The Iowa Libel Project grew out of the Iowa Libel Study. The project sets up an alternative dispute resolution system in conjunction with the American Arbitration Association where plaintiffs and defendants can agree to a quicker, less expensive solution to disputes. This system requires plaintiff to waive the right to sue in exchange for a system of arbitration. The Project has yet to handle its first case.

[5] Black's Law Dictionary defines retraction as a taking back, a formal recanting of the defamatory material. Retraction is not a defense in defamation but under certain circumstances, it is admissible in mitigation of damages.

[6] "Comments: Constitutional Aspects of Retraction Statutes," 27 Fordham Law Review 254, 255 (1958).

1835 allow retraction in mitigation of damages[7] in libel and slander.[8] Although states began to pass statutes concerning retraction in the early 1880s[9] and a number of states have had statutes at some time during their legislative histories, approximately seventeen states have never had retraction statutes.[10] Of the thirty-three states with retraction statutes in 1985, at least five no longer have such statutes on the books.[11] However, those states without statutes do recognize retraction of inaccurate information as admissible in defamation suits under the common law.

The common law of defamation historically has held publishers liable for each article published, regardless of the source of the information.[12] Under the common law there were several types of damages. General,[13] consequential[14] or rescissory[15] damages were presumed to naturally result from a defamatory publication. No evidentiary proof was necessary and no damage had to actually occur. These damages were designed to compensate for injuries arising from injured feelings, mental suffering, anguish, humiliation and general damage to the reputation of the individual.

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[7] Black's Law Dictionary defines mitigation of damages as the doctrine of avoidable consequences which imposes on the injured party a duty to exercise reasonable diligence in attempting to minimize damages after injury has been inflicted. Under the common law, it was the responsibility of the plaintiff to call an error to the attention of the publisher soon after publication if he were to claim all possible damages in a libel or slander suit.

[8] Trabue v. Mays, 33 Ky (3 Dana) 138, 28 Am.Dec.61 (1835).

[9] Michigan and Minnesota are examples.

[10] Sanford, Bruce W. Libel and Privacy: The Prevention and Defense of Litigation. New York: Harcourt Brace Jovanovich, 1985, pp. 479-82.

[11] Westlaw search February 9, 1989.

[12] 27 Fordham Law Review 255.

[13] Defined by Black's Law Dictionary as having accrued from the immediate, direct and proximate result of the actions of the other party.

[14] Black's Law Dictionary defines consequential damages as those losses which are a result of an act but are not direct or immediate.

[15] According to Black's Law Dictionary, rescissory damages are designed to return the injured party to the position he occupied before the wrongful action when return of specific property is not possible.

Actual or compensatory damages,[16] which include loss of income, property and other tangibles, were also recoverable when claimed, proven and computed as actual monetary loss to the individual due to the publication of defamatory material.[17] Punitive damages[18] were designed to punish the publisher and frequently amounted to a windfall for the plaintiff. Punitive damages were not included in actual or general damages, including injury to feelings, mental anguish and injury to the reputation, and were usually awarded only if the plaintiff showed negligence or ill-will on the part of the publisher.[19] General and punitive damages could be awarded without proof that damage occurred;[20] therefore, the common law had grave consequences for publishers. Common law defamation balanced heavily toward reputational rights at the expense of free speech and press rights.[21]

Under the common law vindication of the defamed person is the major objective, and publication of a retraction was thought to contribute to this end. One writer said, "As a matter of logic and usual fact, a retraction if made promptly and in good faith can ordinarily reduce substantially the harm done by the original defamation and also tends to show in the defendant an absence of that malicious ill-will which is a common justification for awarding punitive damages."[22] The concept of a full recanting and apology in a publication had additional implications for the defamed. There was a general belief that monetary damages were not adequate vindication of reputation and that law suits for damages were inconvenient for most individuals.[23] Although not a defense against libel, good faith publication of a retraction or apology could defeat a claim for punitive damages[24] and decrease the amount of general damages.[25]

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[16] Actual and compensatory damages are defined by Black's Law Dictionary as those real, substantial and just damages which will compensate the injured party for the injury sustained and nothing more.

[17] Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 814 (1904).

[18] Punitive damages are damages awarded against a defamer to punish him for outrageous conduct. Black's Law Dictionary.

[19] Osborn v. Leach, 135 N.C. 628, 47 S.E. 811, 813 (1904).

[20] 27 Fordham Law Review 258.

[21] Fleming, John G. "Retraction and Reply: Alternative Remedies for Defamation," 12 University of British Columbia Law Review 15 (1975).

[22] Leflar, Robert A. "Legal Remedies for Defamation," 6 Arkansas Law Review 423, 437 (1952).

In slander, a speaker could avoid all liability for a defamatory statement if he recanted in the presence of the same audience so that "no impression is left on the minds of the hearers" that the defamatory statement was true.[26] This concept required that all who heard the defamatory remark be present during the recantation. With publications, it is impossible to assure such complete exposure to the original audience, but the courts did accept that a retraction would serve to avoid some damages to the reputation of the individual if published in a conspicuous place in the same publication as soon as possible after publication of the defamatory statement.

Through publication of a retraction, a publisher could avoid suit altogether if the plaintiff was satisfied with the apology, and it was assumed that responsible publishers would eagerly retract inaccurate statements if the inaccuracy were called to his attention.[27] Because under the common law retraction was voluntary, it could be used to show that the publisher of defamatory material was interested in practising responsible journalism and wanted to correct the error once it was called to his attention.

Under the common law concept of retraction a person sued for libel or slander could use a published retraction in several ways:

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[23] Speranza, William J. "Comment: Reply and Retraction in Actions Against the Press for Defamation: The Effect of Tornillo and Gertz," 43 Fordham Law Review 223 (1974).

[24] McThenia, Andrew W. Jr. "Case Comments: Retraction Statutes: A Change in the Law of Libel," 19 Washington and Lee Law Review 239, 242 (1962).

[25] "Recent Cases: Libel and Slander -- Validity of Statute Limiting Recovery in Newspaper and Radio Defamation to Special Damages Where Correction is Made," 99 University of Pennsylvania Law Review 107, 108 (1950).

[26] Trabue v. Mays, 33 Ky. (3 Dana) 138, 28 Am Dec. 61 (1835).

[27] McThenia, Andrew W. Jr. "Case Comments: Retraction Statutes: A Change in the Law of Libel," 19 Washington and Lee Law Review 239, 240 (1962).

- to show that because a retraction was published and there was the opportunity for others to see the correction, injury to plaintiff was less than claimed,[28]
- to indicate good faith where the question of abuse of a privilege was claimed,[29]
- to show good intentions on the part of the publisher where negligence or malice was claimed,[30]
- to influence jurors concerning the fairness of the publisher, and[31]
- to serve to mitigate actual, general and punitive damages.[32]

The amount of damages was a jury question, the purpose of admission of a retraction was to allow the jury to determine if the publisher really meant to try to correct the wrong to the person's reputation. In Ellis V. Brockton Publishing Co., the court said, "The publication of a retraction, complete in character and conspicuous in position, might be found to have a material effect in diminishing the mischief caused by the libel, and thus substantially reduce the damages sustained by the person libeled."[33] But retraction was not considered a perfect solution. "A retraction, it is claimed, is at best an illusory remedy since it is a moral certainty that the retraction will not reach all to whom the defamatory statement was published. Indeed it may serve only to republish the original statement, bringing the matter to the attention of those who had never heard the original statement."[34]

Even in states where statutes exist, some common law retraction elements remain. And a number of states with statutes preventing recovery of punitive damages and mitigation of general damages ran into problems with due process constitutionality.[35] These statutes required the plaintiff to demand a retraction and barred recovery of punitive and sometimes general damages if a retraction was printed. Because actual damages are very difficult to prove, allowing a publisher to avoid general and punitive damages left numerous plaintiffs completely without redress.[36] This took away a person's reputational rights by denying the plaintiff a chance to state his claim in court. Morris said, "To deny plaintiffs recovery for retracted libel unless they prove special damages, is to do away with newspapers' financial interest in accuracy . . . If newspapers could atone legally for their mistakes merely by publishing corrections, the number of mistakes might increase alarmingly."[37] However, in states where the constitutionality of statutes was struck down, the admissibility of a retraction to mitigate damages in court remained, since the due process question was not applicable if the jury had a chance to consider the issue.

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[28] Meyerle v. Pioneer Publishing Co., 45 N.D. 568, 178 N.W. 792 (1920); Webb v. Call Publishing Co., 173 Wis. 45, 180 N.W. 263 (1920).

[29] Ely v. Mason, 115 Atl. 479 (Conn. 1921).

[30] Fessinger v. El Paso Times Co., 154 S.W. 1171 (Tex. Civ. App. 1913).

[31] Sanford, p. 482.

[32] Webb v. Call Publishing Co., 173 Wis. 45, 180 N.W. 263, 263 (1920); Ellis v. Brockton Publishing Co., 84 N.E. 1018 (1908).

[33] 84 N.E. 1018, 1020 (Mass. 1908).

[34] "Comments: Constitutional Aspects of Retraction Statutes," 27 Fordham Law Review 254, 257 (1958).

Under the common law, if a retraction was less than complete or was not a sincere effort to correct the error, the judge could decide it was inadmissible as evidence. The judge in Hotchkiss v. Oliphant explained the court's reasoning:

> If this article had contained a full and unqualified withdrawal of the charges in the libel, unaccompanied with other offensive or libelous matter, and had been intended and published as some slight atonement for the injury done, I think it would have been admissible for the purpose for which it was offered. It would have afforded proof not only of a disposition to repair the wrong inflicted, but of actual reparation to some extent. . . . If the defendant had become satisfied that the charges which he had unwittingly copied were unfounded, common honesty and a decent respect for the rights of the injured party called for an unqualified withdrawal. . . A libelous publication may be inadvertently admitted into the columns of a newspaper, and the editor chargeable only with mistake of indifference to the truth; but if when advised of his error, he hesitates to correct it, the case rises to one of premeditated wrong. . . which should be dealt with accordingly.[38]

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[35] Examples are Kansas and Michigan. See Hanson v. Krehbeil, 75 Pac. 1041 (1904), and Park v. Detroit Free Press, 72 Mich 560, 40 N.W. 731.

[36] Speranza, William J. "Comment: Rely and Retraction in Actions Against the Press for Defamation: The effect of Tornillo and Gertz," 43 Fordham Law Review 223, 224 (1974).

[37] Morris, Clarence. "Inadvertent Newspaper Libel and Retraction," 32 Illinois Law Review 36, 45 (1937).

[38] Hotchkiss v. Oliphant, 2 Hill 510 (N.Y. 1842).

The sufficiency of a retraction was both a question of law and of fact.[39] If it was a question of whether a retraction was indeed a retraction, it was considered a question of law to be decided by the judge. If it was a question of whether the retraction actually decreased the harm to the individual, it was a matter of fact to be decided by the jury. Publication of a statement that the victim of a defamation denied the charge was not considered a retraction,[40] and a mere offer to retract was not admissible at common law.[41] Apparently the intentions of the publisher were seriously questioned and it was assumed that if he were sincere about retracting, he would do so, not just merely offer to do so or state publicly that the defamed person disagreed with him about the truth of the issue. Retraction also did not always serve to protect the publisher. The question of what weight to give an admissible retraction was one for the jury, and the jury could completely ignore any effect a retraction might have on damages.[42]

Failure to retract could work both ways for the publisher. If it was a question of whether malice or negligence was involved in the defamation, a refusal to retract might indicate that the publisher believed and continues to believe that the information published was true.[43] Arguments have even been made that to retract a statement the publisher believes is true can be considered irresponsible.[44]

Some scholars say that retraction is no longer a valid part of mitigation of damages[45] after Gertz,which limits the award of punitive damages in libel cases,[46] and

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[39] Eldrege, Laurence H. The Law of Defamation, New York: Bobbs-Merrill Co., Inc., 1978, pp. 551-552.

[40] Smolla, Rodney A. Law of Defamation, New York: Clark Boardman Co., Ltd., 1988, p. 9-30.

[41] Turton v. New York Recorder Co., 38 N.E. 1009 (N.Y. 1894).

[42] Deloach v. Beaufort Gazette, 316 S.E.2d 139 (S.C. 1984).

[43] Travoulareas v. Washington Post Co., 759 F.2d 90, 132 N. 51 (D.C. Cir. 1985).

[44] Bloom, Lackland H. Jr. "Proof of Fault in Media Defamation Litigation," 38 Vanderbilt Law Review 247, 385 (1985).

[45] Vater, Joseph A. "The Death of Retraction Statutes," 36 University of Pittsburgh Law Review 756 (1975).

[46] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

Tornillo, which invalidated Florida's right to reply statute in language possibly applicable to retractions.[47] But the fact remains that a number of retraction statutes are still on the books. The rest of this paper will look at those statutes, analyze their validity and seek to find language appropriate for a workable retraction statute.

Statutory Retraction

As of March 1989, twenty-eight states had active retraction statutes. Language, definitions, requirements and consequences vary, but it is significant that the idea of retraction as a valid means of mitigation of damages has received legislative approval in each of these states.

Some statutes, such as those of Alabama (1852), California (1872), Massachusetts (1895), Michigan (1895), Utah (1898), West Virginia (1849) and Wisconsin (1897), reflect early and long-standing legislative attempts to clarify common law mitigation of damages through retraction. These statutes indicate a sensitivity to the concept of the dissemination of the truth as the ultimate goal of freedom of speech and the contribution setting the record straight plays in this goal. The wording of the statutes and subsequent judicial interpretations also represent an understanding of the processes and problems in news gathering and circulation.

Other statutes, such as those in Arizona (1967) and Maine (1979), reflect modern concern about the complexity of libel litigation in today's society. These statutes, passed after years of allowing retractional mitigation of damages in the courts, give legislative approval of the concept. The statutes, however, add little to established legal precedent as reflected in individual court decisions involving mitigation of damages through retraction.

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[47] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

Throughout the retraction statutes where the types of damages are stated, the following definitions are consistent and there is evidence similar meanings underlie statutes which do not specify definitions of the terms:

> "Actual" or "special damages" are damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession, or occupation, including money the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;
>
> "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;
>
> "Exemplary" or "punitive damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages. These damages are awarded for the sake of example or by way of punishing the defendant who has made the publication or broadcast with actual malice.[48]

Generalizations about retraction statutes should stop here, however, since other parts of the statutes are significantly different in meaning and effect. Although provisions of the statutes can be grouped in several ways, similarities are found in bits and pieces. States which have similar provisions regarding limitations on damages may have different provisions on notice requirements, the media affected or exceptions. Therefore, it is important that conclusions about similarities in retraction statutes be drawn very carefully.

The following information draws composites from six commonly held provisions, but does so as if the provisions were isolated instead of part of the whole. Analysis of problems with the statutes will be undertaken in the third part of this paper. The six categories summarized here are: (1) damage limitations, (2) media affected, (3) notice requirements, (4) retraction content and location requirements, (5) retraction in criminal libel, and (6) exceptions to the use of retraction in mitigation of damages.

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[48] Wording for these definitions was taken from the California statute. Almost identical or similar wording appears in other statutes.

(1) Damage limitations

All states with retraction statutes allow retraction to be used in the mitigation of damages, and twenty states limit damages to actual or special damages through at least some provision. Four states -- Kentucky, Massachusetts, Montana and South Dakota -- allow a published retraction as a complete bar to punitive damages. Five states -- Iowa, Maine, Ohio, Virginia and West Virginia -- allow retractions to be used only in general mitigation of damages, giving no additional strength to the protection afforded publishers under common law retraction.

Of the twenty states limiting recovery to actual or special damages, five do so unless a retraction is refused, as long as the information was published in good faith with the belief the facts were true. Eight additional sates limiting recovery to actual damages when a retraction is published allow other damages if the information was published with malice. Two states -- Alabama and Massachusetts -- protect the publisher from punitive damages, even if the publication was made with malice.

The protection from punitive and general damages, which can be substantial and unpredictable, indicates a desire to give publishers some hope that they can publish news without fear of devastating judgments. The goal is to lessen the chilling effect such large awards can cause while providing some remedy to those who have been defamed. However, none of the statutes provides much protection from the chilling effect on media, since litigation is time consuming and very costly. The publisher must go through the litigation process before he knows for sure whether a judge and/or jury will accept his retraction as lack of malice. The two states which bar punitive damages even if malice exists come closer to providing protection from the chilling effect. However, general damages, which are often based on unmeasurable criteria, can be very large and closely resemble punitive damages, can be almost as chilling as allowing punitive damages.

(2) Media affected

While most states with retraction statutes apply retraction laws to print and broadcasting, Indiana, Kentucky and Utah have separate statutes for broadcasting stations. Eleven states mention print and broadcast media in the same statute and have different time requirements for presentation of the retraction after notice. Alabama, Maine, Massachusetts, Michigan, Nebraska and West Virginia do not specify the media affected by the statute. Most statutes simply say in any action involving libel or slander, but the Nebraska statute states "in any medium."

In nine states --Georgia, Minnesota, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Virginia and Wisconsin -- language in the statute specifies print media, and in six of those --Minnesota, Mississippi, North Dakota, Ohio, South Dakota and Utah -- the language specifies only newspapers. A number of statutes are quite specific about the media covered. Montana lists "newspaper, magazine, periodical, radio or television station, or cable television system." Florida's statute says "newspaper, periodical or other medium," and Iowa's code includes a "free newspaper or shopping guide." Oregon includes motion pictures, and Indiana includes news services.

The variety of media included or excluded in the statutes allows for creative argumentation from either side of the dispute concerning whether certain media are covered by the statute. For example, there is no uniformly accepted legal definition of a newspaper, such as minimum circulation, frequency of publication, target audience, etc. Even when media are specified, the statutes usually provide different time limits for retraction. This different treatment can cause a misunderstanding of the specifics of the statute and a retraction can be disallowed on technicalities, leaving a well-intentioned publisher without legal protections as he understood the statute.

(3) Notice requirements

The greatest differences among the statutes are in the notice requirements. Ten states require that a publisher be given written notice of the defamatory nature of the material. This notice must clearly specify which statements are claimed to be defamatory before suit can be filed. Kentucky, Montana, Oregon and Wisconsin statutes also require that the notice state the true facts, and Montana, Oregon and Wisconsin statutes suggest that the plaintiff should "state the sources, if any, from which the true facts may be ascertained with definiteness and certainty."[49]

Notification requirements break down into two major categories, those requiring that notice be given to the media organization a specific number of days before suit and those requiring notice a specific number of days after knowledge of the publication. Of those requiring notice a specific number of days before suit is filed, Indiana, North and South Dakota require three days; Alabama, Florida, North Carolina and Tennessee require five days; Georgia requires seven days; Mississippi requires ten days; and Iowa, Kentucky, Montana, Minnesota, Ohio, and Wisconsin require notice without giving a specified time.

Of those requiring notice within a specific number of days after knowledge of the publication of the defamatory information, Arizona, California, Nebraska and Oregon require notification within twenty days, and Nevada requires notice within ninety days.

The requirement that notice be given a limited number of days after knowledge of the defamatory publication indicates a particular concern for retraction as a way to limit damage to the reputation of the individual. The goal is to have the retraction published soon after the defamation instead of near the end of a long statute of limitations for filing suit. Requiring notice soon after knowledge of the publication also allows the media to check the facts while the stories are still newsworthy and sources and information trails are still fresh. However, the legal definition of "knowledge" presents a peculiar problem if not spelled out in the statute.

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[49] This wording is taken from the Wisconsin statute. The wording in the Montana and Oregon statutes are similar.

(4) Retraction content and location requirements

While a number of states do not try to define what constitutes a retraction or correction, others become quite specific about where the retraction should run and how. Six states -- Alabama, Kentucky, Montana, Ohio, Oregon and Wisconsin -- try to assure the contents of the retraction will be sufficient by stating that the retraction must be a "full and fair" one. Nineteen statutes specify location, type style, prominence and/or other specifics about the retraction. The most often used terms are "in as prominent and public a place as the original publication" and "as public and conspicuous a manner as the libelous statement." However, Ohio's statute says the newspaper "shall print, publish and circulate any statement or article setting forth in proper language the truth pertaining to such statement, allegation, or rumor, which such persons or their representatives shall offer to such company for publication." The statute specifies that the retraction "shall be phrased in proper language and be printed . . . in the same color ink, from like type, with headlines of equal prominence occupying a like space in the same portion of the newspaper as was used in printing the original article complained of, and shall be given the same publicity in all respects and, as nearly as possible, the same circulation as such original article." Georgia requires publication of an editorial in addition to the retraction, if the plaintiff requests. Minnesota, North Dakota and South Dakota require an editorial page publication in addition to the retraction if the defamed person was a candidate for public office. Oregon's statute requires a retraction and an apology and specifies a distinct difference between the two.

These provisions indicate a concern that the retraction be an honest attempt to set the record straight. A number of problems are inherent in what is a full and fair apology or retraction, and those problems will be discussed in Section III of this paper.

(5) Retraction in criminal libel

Florida, North Carolina and Ohio laws allow retraction to be used to lessen penalties for criminal libel. In Florida, a full and fair retraction bars criminal prosecution. In North Carolina, "if, in a criminal proceeding, a verdict of 'guilty' is rendered . . . the defendant shall be fined a penny and the costs, and no more." Ohio's statute makes it a crime to refuse to publish the true facts if requested and presented to the newspaper by any person affected by the defamatory publication. The county attorney is in charge of prosecution, and punishments by fines of $500 to $1,000 and imprisonment for up to a year are provided.

These criminal libel statutes are of questionable constitutionality, especially since the Tornillo v. Miami Herald[50] United States Supreme Court decision, but they remain on the books.

(6) Exceptions to the use of retraction in mitigation of damages

Three states specify that allegations about sexual conduct are exempt from the protections afforded through retraction laws. Iowa and Minnesota exclude allegations of sexual misconduct for anyone, and Oklahoma excludes statements referring to unchastity of a woman. In addition, Mississippi specifies that the retraction statute "shall not apply to any editorial or to any regularly published column in which matters of opinions are expressed." It is unclear whether opinion is to receive more or less protection because of this exclusion.

Nine states -- Indiana, Iowa, Minnesota, Mississippi, North Dakota, Oklahoma, South Dakota, Tennessee and Utah -- provide different requirements for defamatory statements made about a political candidate and specify that the retraction must be run in sufficient time before the election for the falsity to be corrected. This indicates a sensitivity to the high stakes involved in elections, and the understanding that setting the record straight after a candidate has lost an election because of the defamatory statement does not do as much good as setting the record straight in other situations.

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[50] 418 U.S. 241 (1974).

Although there are workable elements in each of the statutes, a number of problems exist. In the next section of this paper, I shall attempt to create a workable model statute which provides some protection for media while also allowing those who are actually harmed by publication to recover reasonable damages.

Proposed Statute

Many scholars, legal experts, judges and academicians have called for reform of libel law with a refocus on protection of freedom of speech and dissemination of truth.[51] Most of the suggestions for reform include use of retractions, with the Annenberg Proposal suggesting that a retraction should be a complete bar to suit regardless of motive of defendant or economic damages to plaintiff.

A number of reasons have been given for the need to reform libel law. The most pervasive have been:

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[51] Among them are retired Court of Common Pleas (Philadelphia) Judge Lois G. Forer, in her book A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Action to the First Amendment, New York: W.W. Norton, (1987); law professors Gilbert Cranberg and Randall P. Bezanson and journalism professor John Soloski in their book Libel Law and the Press: Myth and Reality, New York: The Free Press (1987); Rodney A. Smolla in his book Suing the Press, New York: Oxford University Press (1986); Floyd Abrams in his article "Why We Should Change the Libel Law," New York Times Magazine (Sept. 29, 1985); and the eleven members of the Annenberg Libel Reform Project in their report Proposal for the Reform of Libel Law.

- The chilling effect on free speech caused by a fear of complex, expensive litigation where the defendant cannot know the rules of the game until he is in court;
- The prohibitive cost in time and money for plaintiffs in a system where legal fees and related costs frequently eat up damage awards;
- The vastly different rules, which change over fairly small geographic areas and sometimes cause border-area competing media to be treated differently;
- The uncertainty in having to defend news-gathering procedures, states of mind and stories the defendant believes are accurate;
- The reluctance of media management to stress ethics in the newsroom because codes of ethics and instructional manuals could be used in court to establish malice through behavior contrary to "established" rules;
- The time-consuming and lengthy legal process delays the establishment and dissemination of truth for years;
- The current system seldom establishes truth.

The need for reform is real. The evolution of protections for defamation has created a complex set of libel laws which now consume enormous amounts of money, energy and time to litigate. Because of the complexity of libel law, plaintiffs' and defendants' attorneys must be specialists, and their fees frequently equal or exceed damage awards.[52] Even if the media win, they are strapped with huge legal fees. Litigation can take years, and although the plaintiff frequently wins at the trial court level, the media usually win on appeal. The current system basically addresses process -- fault, news gathering, intentions -- instead of truth or falsity.[53]

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[52] Proposal for the Reform of Libel Law 9.

[53] Soloski, John, Truth Not Fault: The Way to Resolve Libel Disputes Out of Court. Minneapolis: Silha Center for the Study of Media Law Ethics and Law (1989).

The convoluted provisions of different state statutes produce confusion and uncertainty. Forer stresses a clarification of libel law should include simplification and unification through a federal law.[54] Her point is well taken. With the increasing consolidation of the media, larger circulations, greater broadcasting power, satellite transmission, national radio and television programming and international magazines, most media must be concerned about libel law provisions in several or more states. The current system requires an attorney in the newsroom just to make "safe" decisions about what to print. This, in itself, is a frightening concept, for decisions on free speech are then filtered through the laws instead of protected by them. When newspapers and other media regularly filter even slightly controversial articles through the attorneys, as the St. Paul (Minn.) Pioneer Press Dispatch[55] and the Miami (Fla.) Herald[56] do, fears of chilling freedom of speech in the newsrooms across America are real. A small publication or broadcasting station, which could be forced into bankruptcy by even a $200,000 judgment, will avoid controversy altogether, just to stay in business. Retraction statutes which allow only mitigation of damages are too weak to solve these problems.

The logic, apparent simplicity and speed with which a retraction can set the record straight make strong retraction statutes appealing as a solution to some of the complex problems of current libel law. A uniform retraction law, which allows media to protect themselves from mistakes and allows defamed persons some recourse for documented, real harm, would go a long way toward reducing chill, even if other parts of the current libel litigation process remain. However, proponents of a federal (and therefore uniform) retraction statute must carefully balance freedom of speech, the public's right to acquire information and the individual's right to protect his reputation.

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[54] A Chilling Effect: The Mounting Threat of Libel and Invasion of Privacy Action to the First Amendment.

[55] Interview with Wayne Hassel, Assistant to the Editor, April 27, 1989.

[56] Interview with the Editor of the paper, March 1988.

Proposals setting the stakes too high for either party, lacking an understanding of the news-gathering process and media-user patterns, denying a defamed person a chance to claim provable monetary loss caused by sloppy journalistic practices or overlooking the public's interest in truth are problematic.

Most of the existing statutes provide a two-tiered hurdle for the plaintiff while providing little to protect the media from the threat of litigation. To claim certain damages, plaintiffs must know to demand a retraction properly and have their request refused. From the plaintiff's point of view, the statutes clearly limit recovery if no retraction is demanded and also limit recovery to those specific statements claimed as defamatory within as little as twenty days of knowledge. A plaintiff who later discovers reputational harm from other statements is out of luck.

Under the same statutes, media still must go through the process of defending against libel suits, a costly, disruptive and time-consuming process. Unless the statute clearly provides for a limitation to actual pecuniary damages regardless of motive, as statutes in Massachusetts and South Dakota almost do, the defendant must still deal with many unknowns involving the types and measurability of damages which can be claimed.

The Annenberg Proposal contains some valid concerns and attempts to balance competing interests. One of the strengths of the proposal is the elimination of false-light invasion-of-privacy claims which can provide a loophole for plaintiffs to get around retraction laws, but the proposal goes too far in completely barring suit if a retraction, which the plaintiff has no control over, is published. It also goes too far in including all defamation, regardless of medium, in the same set of provisions. Audience patterns and technical considerations are different for newspapers and broadcasting stations, and these differences should be considered significant.

A workable retraction statute which balances all interests successfully is not easy to create. Such a statute must include:

1) A clear statement of the purpose of the statute;

2) A clear definition of a correction or reply;

3) Specification of what media are affected;

4) Specification of types of speech covered by the statute;

5) A reasonable provision for notification of a defendant;

6) A definition of a timely correction;

7) A definition of adequate circulation of the correction;

8) A provision for an editorial-page alternative to a correction;

9) A provision for plaintiff to assist defendant in verifying truth;

10) A provision for agreement between the parties concerning the adequacy of correction or apology;

11) Concrete limitation on damages;

12) A provision for good-faith refusal to correct.

The following is proposed as a model statute which would protect the rights of individuals while reducing the chill on the media. To be successful, any retraction or correction statute should be uniform throughout the states, and it is unlikely that fifty different legislatures would pass such legislation. Therefore, this statute is proposed as federal legislation. In light of the strong prohibitive language in the First Amendment, care has been taken to assure that the statute encourages rather than prohibits free speech through a multi-level participation of voices in the marketplace of ideas. The purpose is to give options concerning speech rather than mandates. The statute encourages dissemination of truth by giving incentives based on an understanding of media processes. Media organizations that would prefer to go to court to defend their stories can still do so. Proposed provisions of the statute are in bold at the beginning of each section. Discussion and reasons follow in light-face type.

The Proposed Correction Act

1) The purpose of this act is to encourage the dissemination of truth and provide a speedy remedy for defamation which will clear

the reputation of the defamed person without placing an undue burden on the mass media. True defamatory information has complete protection, and no correction, retraction or reply is needed to bar suit through declaratory judgment. The statute applies only to information which is untrue or clearly implies untruth through a significant series of inclusions and/or omissions. It encourages cooperation of the parties directly involved in the defamation to quickly identify specific errors of fact, identify verifying sources and correct the erroneous information to the public. Provisions are predicated on an understanding that the public has an interest in the dissemination of truth equal to that of the parties in a defamation suit. Additionally, the statute accepts that truth is often nebulous and provides for honest, good-faith differences in the definition of truth.

The key to this section is the emphasis on the dissemination of truth as a public good and correction of the erroneous information as a means of serving that public good. The statute provides for more information through an incentive for the media to avoid suit without losing face or damaging the reputation of the medium in the public's eyes. Correction is the preferred term, and a correction can be made through a retraction, which takes back the information, or a reply which allows the defamed person to publicly disagree with the information. A key provision of the statute is the media's option of publishing a retraction or allowing a reply agreed upon by both parties with the same interests: determination of and publication of information which contributes to the ultimate truth.

2) This statute provides to the publisher of the defamatory statement an option of publishing a retraction or reply to correct

erroneous defamatory information.[57] Publication of a retraction or reply limits recovery as stated in Section 11 of this act.

a) A "retraction" is a good-faith publication of information designed to correct an error in fact or insinuation. The retraction must state the original inaccurate information and clearly correct the meaning of the words by giving the facts as they have been determined and verified.

b) A "reply" is a statement created and provided by the plaintiff or his attorney stating the facts as the plaintiff sees them and giving in the reply sources other than the plaintiff for verification by those who wish to do so. If the plaintiff is unable to provide independent sources for verification, the defendant may run the reply without such sources, thereby limiting plaintiff's claims as specified in Section 11 of this act. The reply must be concise, in a style suitable for the medium and limited to rebuttal of the defamatory statements. Gratuitous statements irrelevant to rebuttal of the facts alleged to be false and defamatory may not be included.

This section stresses correction in the most appropriate form. Length of the reply is not controlled, since the publisher has the option of publishing a retraction of the information or the plaintiff's reply and the plaintiff has the additional burden of providing sources for the information presented. There are times when clarification and source information through reply will reasonably consume more time or space than the original defamatory statement. Requiring the plaintiff to include sources from which the information can be verified provides additional assurance that the correction will be seen as such by the public. It also is consistent with general news-gathering practices used by traditional media.

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[57] In states which have independent "adjudicating" news councils involving public and media members, publication of the unedited news council decision could be considered adequate retraction or reply. This would apply regardless of whether the decision was in favor of the plaintiff or the defendant. Wording of the statute would have to include this provision, and the traditional news council legal waiver requirement, which has not been tested for validity, would need to be addressed.

If the publisher does not want to run the information in reply form, he can avoid penalties by wording and presenting his own retraction. But requiring the medium to run a retraction only to avoid penalties, as the Annenberg Proposal does, puts too much pressure on the medium to retract. Defendant, not plaintiff, should have the option of retraction or reply because:

- The editor should control the content of the medium;
- The publisher should be allowed to present the correct information in whatever manner will do the least damage to the reputation of the publication;
- Allowing the defendant to run a reply instead of having to retract means that in cases where both interpretations of the facts have merit, plaintiff, defendant and the public can be served without requiring defendant to take back information he does not believe should be taken back;
- A reply gives the plaintiff greater control of the nuances of correction;
- The public can better judge truth if the speaker is clearly identified. A reply would be run under the plaintiff's byline, clearly identifying the source of the article to the public. This sends a qualifying message to the public and alerts them to possible bias in the information. In a retraction reluctantly run under pressure of pending suit and severe penalties, the public has no way of knowing the circumstances, and therefore misses out on important facts needed to evaluate the truth of the information.
- Truth is often difficult to identify. The plaintiff may be the only source of the truth, making publication of his or her version contrary to standard journalistic

practices of verification. Also the media may not have access to sources to verify the information plaintiff claims to be true.

Nothing in the statute prohibits plaintiff from requesting a particular type of correction in lieu of suit and defendant agreeing to accommodate the request. Either retraction of erroneous information or reply in the plaintiff's words which stress differences of opinion concerning the facts will serve to clear the plaintiff's name.

3) This statute applies to any printed medium designed for circulation to a specialized or general group of ten or more persons.

Although defamation can occur with devastating results in broadcasting, motion pictures, speeches and dramatic performances as well as print media, there are considerable differences in the various media which make application of one statute to differing technologies unwise. Because of user patterns and the fleeting nature of radio, television and cable broadcasts, it is difficult to assure even reasonable exposure to the same audience. Because of the one-time-attendance user patterns at most speeches, motion-picture showings and dramatic performances, assuring that the correction reaches the original audience is even more problematic. In the print media, reaching the same audience is more likely, since the medium provides a permanent record to be scanned in the audience's available time, and publication in approximately the same location will reach most users who regularly use the publication.

Defining the circulation at ten or more is a practical matter. In modern American society, there will seldom be major damage to the reputation of an individual if nine or fewer persons are exposed to the defamation. In those cases where serious defamation occurs to fewer than ten persons, the audience could be easily identified and contacted with the correct information by plaintiff or defendant. Setting the intended circulation low will include such media as credit-reporting agencies, news services and highly specialized professional publications.

4) Provisions of this act apply to false, defamatory statements of fact. Statements of opinion have absolute protection from damages, but must be clearly marked as opinion in the original publication by such designations as "editorial," "reply," "opinion," "forum," "letters," "fiction" or run in sections of the publication clearly designated for such.

American courts have a long-standing tradition of protecting opinion as valuable to the exchange of ideas. False information presented as facts, however, has not been so protected. This statute is designed to protect mistakes, errors in judgment, use of misinformed sources and other pitfalls of the journalistic tradition in America.

5) Plaintiff must notify defendant in writing and request a correction within thirty days of knowledge of the defamatory statement(s) as long as notification takes place within ninety days of actual publication and circulation. The notification must be signed by the plaintiff, identify the specific statements claimed to be defamatory, give information about why the statements are untrue, and give the true facts and sources from which the correct information can be obtained. Failure to so notify and request correction bars suit.

Because the plaintiff is the one most likely to know the truth and have access to sources for verification, it is reasonable to require him to notify the defendant, who may not know the information is untrue unless he is told. The plaintiff must provide information to allow the defendant to check the facts. Only the plaintiff can sign the request for retraction. Notification within thirty days of knowledge of the publication is reasonable, although there may be times when this is considerably after publication, because publications frequently present information in media not used by the plaintiff. Limiting the time to ninety days after actual publication and circulation provides for verification of the information while a story is still newsworthy and sources are still available. The actual publication and circulation provision applies to such publications as magazines which are frequently dated for times other than that of actual availability to the public.

6) Correction must be published in a timely manner and be circulated within thirty days of notice or, if the regular publication date including standard production cycles is later than thirty days, in the next regular issue. If the defamation is made in a medium which has no regular publication schedule, correction must be made in a special issue circulated within thirty days after notification.

Any publication should be given a reasonable time to investigate and verify facts to be used in a retraction or reply. Because defamation can be made in publications of various circulation cycles, it is necessary to include some flexibility in the timing of correction. Forcing a bimonthly magazine to publish a special edition would be cost prohibitive and would be less likely to reach the same audience as publication in a regular issue in the same part of the magazine which contained the defamation. However, because this act covers any publication intended for circulation to ten or more persons, some publications covered in this act will have no regular publication schedules. The provision for a special issue is reasonable in such cases and prevents the publisher from delaying publication on a technicality.

7) An adequate circulation of the correction is circulation to the same subscription list and in the same newsstand outlets as those used for the defamatory publication. A five percent error factor is allowed for cancelled subscriptions and unlocatable persons. If the publication has no subscription list, adequate circulation is circulation in the same manner and to the same outlets used for the

> **defamatory publication. Unless the publication has a standard location for publication of corrections or the publication of the correction appears on the editorial page as provided for in Section 8 of this act, publication must be in the same general section of the publication, in the same type style and size and of the same prominence as the original defamatory statement. The headline on the correction must be in at least 18-point type.**

The goal of this section is to reach the same audience with the correction as was reached with the defamatory statement. Although this cannot be assured, requiring circulation to the same subscribers and in the same distribution outlets with publication in the same section of the publication will reach a major portion of the audience and takes user patterns into consideration as much as feasible for mass-circulation publications.

> **8) If the publication has a standard policy for running corrections or the publisher takes the option of printing a reply, the correction may be run in the standard location or on the editorial page(s) if a notice of the location of the correction is run in the same location as the defamatory statement appeared. The notice must give the name of the defamed party, date of publication of the defamatory statements, location of the correction and a statement that corrected information appears in the designated location. Both the notice and the correction must be in the same type size and style as the defamatory statement and must carry at least an 18-point headline.**

It is reasonable to assume that if a publication regularly publishes corrections in a standard location, readers will be conditioned to look for them there. Requiring publication of a notice in the same location as the original defamatory statement will expose readers who do not normally look for the correction section to the fact that a correction appears and will give specific information about where the corrected information can be found. This also allows the publisher to publish a reply in the editorial section, where replies, letters to the editor and other opinion pieces normally appear. Publication of the plaintiff's reply on opinion pages designates the reply as the opinion of the plaintiff concerning the truth.

9) In any request for correction, the plaintiff has the responsibility to assist the defendant in determining and verifying the truth. Plaintiff must provide documentation and/or sources for verification of any facts and assist the defendant in contacting such sources. If the defendant fails to make a reasonable attempt to verify the information, the result is the same as if he refuses to publish a correction, assuming the facts are verifiable. If the plaintiff cannot or will not provide adequate information to allow the defendant to verify the facts, there can be no suit.

It is reasonable to require the plaintiff to cooperate by providing sources and how they can be contacted or obtained, since the defendant may not know of or how to find information unique to a particular situation.

10) Plaintiff and defendant have the right to approve or disapprove retraction or reply based on inadequacy, inappropriateness or improper language.

a) In the event the defendant chooses to run a retraction, the defendant shall provide plaintiff with a copy of the retraction and give the defendant 48 hours after receipt to reject the retraction as unsatisfactory. If the plaintiff rejects the correction as inadequate, he must state specific reasons and specify which portions of the correction are not satisfactory

> **and give suggestions concerning wording the plaintiff would consider adequate. If the defendant incorporates the suggestions into the correction in a reasonable manner and publishes the correction, the correction is considered adequate. If the plaintiff does not reject the retraction as inadequate and give suggested wording within the specified time and the retraction runs as provided to the plaintiff, the retraction is considered to be adequate to limit damages as provided in Section 11 of this Act.**
>
> **b) If the defendant chooses to run a reply from the plaintiff, the defendant must approve the reply as in proper form for publication and must run the reply as worded and presented by the plaintiff under the plaintiff's byline without comment. Defendant shall keep a copy of the reply signed by the plaintiff as proof that the reply was run as presented.**

Arguments about what constitutes a retraction are problematic in any retraction or correction statute. Provision of some means of acceptance or rejection of the adequacy of the retraction before litigation gives the defendant additional assurance that publication of a retraction or reply will serve the intended purpose of limiting damages. Requiring the plaintiff to identify portions of the retraction which he considers inadequate and give suggested wording allows the plaintiff to have reasonable say in the correctness of the retraction and lets the defendant make a reasoned decision concerning how to present the information in a manner which will satisfy the plaintiff. Allowing the defendant to incorporate the plaintiff's wording into the retraction without having to obtain further approval prevents the plaintiff from prolonging the discussion indefinitely.

11) If defendant publishes a reply or retraction as specified in Sections 1, 2, 6, 7, 8 and 10 of this Act, damages in any defamation suit based on the statements is limited to actual, provable economic damages and up to 100 percent of the actual damages in compensation for general damages, which include emotional distress, loss of friendships, etc. Award for actual and general damages shall be a matter for the jury. Correction and the circumstances surrounding publication of the correction can be used as a mitigating factor against all damages. If a retraction or reply is run according to the provisions of this statute, no punitive damages shall be allowed for any reason.

Because actual damages are often very hard to prove and there are constitutional due process questions concerning prohibiting recovery of damages for real losses, it is unreasonable, and probably unconstitutional, to allow correction to completely bar suit. However, limitation of general damages based on actual damages and allowing correction to be used in mitigation of all damages clearly prevents windfall awards which can devastate a publication while allowing provable harm to an individual to be reasonably compensated.

12) A good-faith refusal by the defendant to publish a correction based on the defendant's continued belief that the story is true, if properly documented, limits recovery to actual damages. In the event the defendant refuses to publish because he cannot verify the plaintiff's version of the facts, he must notify the plaintiff, giving information about his efforts to verify the facts and why he continues to believe in the truth of the statements claimed by the plaintiff to be defamatory.

Even though the statute requires the plaintiff to cooperate with the defendant in verifying the facts, there will be times when there is honest disagreement about interpretation of facts and/or which facts apply in which way to which statements. A defendant who verifies that he believed strongly in the story and made a careful decision not to run a correction should be allowed to limit recovery.

Conclusion

As with many of the existing retraction statutes, the correction statute proposed in this paper provides a two-tiered hurdle for the plaintiff in a defamation suit. Unless the plaintiff notifies the defendant, and the defendant refuses to publish a correction, damages which can be claimed are severely limited. This process serves the goals of allowing vindication of the plaintiff's reputation, granting the defendant an opportunity to verify information, providing recovery for real losses and encouraging dissemination of truth to the public.

Mistakes are inevitable in publications, given the complexity of the news-gathering process and the propensity for humans to make errors in fact and judgment. Correction can serve a very useful part in protecting the reputation of defamed individuals by providing accurate information to the audience exposed to the inaccurate information. In addition, a system which allows for honest mistakes to be corrected in a reasonable manner provides some protection against the fear of publishing useful information because of devastating awards from libel suits. The proposed system does not condone sloppy journalism or vindictive publication of information but provides protection for the publisher if there is a good-faith effort to right the wrong done.

Timely publication of a correction can help limit the amount of actual damages done to the plaintiff by clearing the record before word of the defamatory statement spreads to a wider audience. The proposed system stresses cooperation of the parties in providing truth to the public. Plaintiff and defendant share responsibility for assuring that the correct information is identified, worded in the most efficient manner and disseminated to the public as soon as reasonable. A correction run as quickly as possible can be used by the defendant in mitigation of damages in addition to the limitation of damages automatically placed on the claims by publication.

The proposed statute would be an improvement over any of the existing statutes, but to be truly effective in preventing the chilling effect, the laws should be uniform throughout the states. The most efficient way to do that is with a federal statute. It is hoped that the process of communication concerning the publication of a correction will prevent many suits. However, this proposal leaves libel litigation intact for those cases where the plaintiff and the defendant cannot cooperate or agree on what is a reasonable correction or where the plaintiff is determined to punish the defendant in some way. Although that leaves the defendants with some vulnerability to the problems with existing libel law, the proposed statute allows the defendant to have some control over the likelihood that litigation will force him into bankruptcy.

Appendix

Elements of Statutes by State

State	Media Affected	Notification Time Limits	Publication Time Limits	Retraction Requirements	Damage Limits
Alabama	All	5 days before filing suit	10 days after publication or 5 days after notice	None	Only actual unless malice
Arizona	Newspapers, TV, radio, magazines	20 days after knowledge	3 weeks after service of notice	As conspicuous a manner in a regular issue	Only special
California	Newspapers, TV, radio, magazines	20 days after knowledge	3 weeks after service of notice	As conspicuous a manner in a regular issue	Only special
Florida	All	5 days before filing suit	Varies from 10-45 days after service	As conspicuous a place and type	Only actual unless malice
Georgia	All	7 days before filing suit	7 days after demand or in next regular issue	As conspicuous and public manner	Only actual unless malice[1]
Idaho	Newspaper, TV, radio	No limit specified	3 weeks after notice	As conspicuous a manner	Only actual
Indiana	Newspaper, news services, radio, TV	3 days before filing suit for broadcasts; 4-11 days before for newspapers, news services	10 days after notice for broadcasts; 3-10 days for newspapers, news services	Transmitted to same audience for broadcasts; as conspicuous a manner for newspapers, news services	Only actual unless malice
Iowa	Newspapers, TV radio, shopping guide	No time specified	2 weeks after service	As conspicuous a place and type or manner	Only used in mitigation of damages
Kentucky	Newspapers, TV radio	Prior to action; no time specified	3 business days after demand or next regular issue if publication; 1 business day if broadcasting	As conspicuous a manner	No punitive damages if retracted
Maine	In any action for libel	None	Reasonable time after publication	As publicly and fully as original	Only used in mitigation of damages
Massachusetts	In any action	Notice optional; no time specified	Publisher must fileP notice of intent to publish retraction before suit or a reasonable time after notice	aintiff has right to accept or not accept offer based on content	Only actual unless malice; no punitive damages regardless
Michigan	Any suit for libel or slander	Before filing suit	Within a reasonable time after notice	Same size, type, editions, position	Only actual

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[1] The language used in "(T)he plaintiff shall not be entitled to any punitive damages and the defendant shall be libel only to pay actual damages." It is unclear whether actual damages applies only to pecuniary damages or also to damages for hurt feelings, etc.

State	**Exceptions**	**Editorial Requirements**	**Reply Option Requirements**	**Must specify false items**	**Demand Required**
Alabama	None	None	None	No	Yes
Arizona	None	None	None	Yes	Yes
California	None	None	None	Yes	Yes
Florida	None	None	None	Yes	Yes
Georgia	None	If requested by π	Unclear, but language indicates letter to editor could be option	No	Yes
Idaho	None	None	None	Yes, including manner of libel	Yes
Indiana	If candidate, retraction must be published at least 3 days before election	None	None	Yes	No
Iowa	If candidate, retraction must be 2 weeks before election	None	None	Yes	Yes
Kentucky	None	None	None	Must state those claimed to be false, tell why false and give truth	Yes
Maine	None	None	None	Δ may show failure to notify in mitigation	No
Massachusetts	Code book includes forms for notification about libelous editorials and cartoons	None	None	Optional	No
Michigan	None	None	None	No	Yes

State	Media Affected	Notification Time Limits	Publication Time Limits	Retraction Requirements	Damage Limits
Minnesota	Newspapers	No time specified	One week after notice	Same page, type, and headed in 18-point type "RETRACTION"	Only special
Mississippi	Newspapers, TV, radio	10 days before filing suit	10 days after notice	Full and fair in as conspicuous a place and type	Only actual
Montana	Newspapers, TV, radio, cable system, magazine	No time specified	One week after notice or in next regular issue; 7 days after notice if broadcasting	Specifies content must be a full retraction, not just apology	No punitive if retracted
Nebraska	Any medium	20 days after knowledge	3 weeks after request	As conspicuous a manner	Only special unless malice
Nevada	Newspapers, TV, radio	90 days after knowledge	20 days after demand	As conspicuous a manner	Only special unless malice
North Carolina	Newspapers, TV radio, periodical	5 days before filing suit	10 days after notice	Full and fair in same editions in as conspicuous a	Only actual if in good faith; if criminal, limits penalties to 1¢ and costs
North Dakota	Newspapers	3 days before filing suit	3 days or next issue after notice	As conspicuous a place and type	Only actual if good faith
Ohio[2]	Newspapers	No time specified	48 hours or in next regular issue	Same ink, type, headline size, space as original	Mitigation of damages only if retraction published without demand; criminal charges barred if retraction
Oklahoma	Newspaper or periodical	No time specified	1 week after notice if daily; 2 weeks if weekly	Same page, type in two issues headed in 18-type with "RETRACTION"	Only actual if good faith

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[2] Ohio's statute calls for mandatory publication of the defamed person's statement if untruths are printed. There is a provision for swearing of the statements, and the publisher must print the statement "without any additions to, or omissions from" the statement provided.

State	Exceptions	Editorial Requirements	Reply Option Requirements	Must Identify False Items	Demand Required
Minnesota	If candidate, retraction must be at least one week before election; does not apply to unchastity claims	Editorial must also be run on editorial page if π is candidate	None	Yes	Yes
Mississippi	If candidate, retraction must be at least 10 days before election; does not apply to editorials and columns[3]	None	None	Yes	No
Montana	None	None	None	Must specify false statements, give facts and encouraged to give sources	No
Nebraska	None	None	None	Yes	Yes
Nevada	None	None	None	Yes	Yes
North Carolina	None	None	None	Yes	No
North Dakota	If candidate, retraction must be 3-10 days before election	If candidate, must run editorial in addition to retraction	None	Yes	No
Ohio	None	None	None	Yes	Yes
Oklahoma	Unchastity to a woman, malice, anonymous; if candidate, retraction must run 3 weeks before election	None	None	Yes	Yes

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[3] The statute does not indicate whether editorials and columns receive more or less protection. It simply says the statute does not apply to them.

State	Media Affected	Notification Time Limits	Publication Time Limits	Retraction Requirements	Damage Limits
Oregon	Newspapers, TV radio, motion pictures, magazine or other printed	20 days after knowledge	First issue, broadcast or after notice	Must say facts not supported and exhibition 2 weeks	Only general unless malice publisher regrets
South Dakota	Newspapers	3 days before filing suit	3 days after notice or next issue	As conspicuous a manner and same position	No punitive if retracted; retraction rebuts malice completely
Tennessee	Newspapers and periodicals	5 days before filing suit	10 days after notice or next regular issue	Full and fair in same editions on front page	Only actual[4] if good faith
Utah	Newspaper, TV radio	Notice not required before filing suit	3 days after notice or filing of suit	Same type, page, position; if Sunday, must be published in Sunday edition within 2 weeks	Only actual if good faith
Virginia	Newspapers, magazines and periodicals	Not required before suit	Reasonable promptness	Reasonable fairness	Can be used for mitigation of general and punitive, but not actual
West Virginia	Any defamation defendant	Not required before suit	Must be offered before suit filed or as soon as possible thereafter	Apology (no specifics)	Only in mitigation of damages
Wisconsin	Newspapers, magazines, periodicals	No time specified but must give a reasonable opportunity to retract	Next issue after one week after notice	As prominent a position and type	Only actual

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[4] The statute says, "(T)he plaintiff shall recover only actual, and not punitive damages." It is unclear whether actual damages applies only to pecuniary damages or also to damages for hurt feelings, etc.

State	Exceptions	Editorial Requirements	Reply Option Requirements	Designation of statements	Demand Required
Oregon	None	None	None	Yes, π also encouraged to provide sources	Yes
South Dakota	If candidate, retraction must run 10 days before election	If candidate, must run editorial in addition to retraction	None	Yes	No
Tennessee	If candidate, retraction must run 10 days before election	None	None	Yes	No
Utah	If candidate, retraction must run 3-5 days before election	None	None	Yes	No
Virginia	None	None	None	No	No
West Virginia	None	None	None	No	No
Wisconsin	None	None	None	Statements must be specified and true facts given; encouraged to give sources	No

The Misleading Search for Content Neutrality in Libel Law

by

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A paper presented to the Law Division at the annual convention of the Association for Education in Journalism and Mass Communication, Minneapolis, Minn., August 9-12, 1990.

Until 1964 the judiciary's role in libel litigation was virtually identical to its role in other civil lawsuits. The courts' responsibility was to provide a neutral forum for the settlement of private disputes, to interpret and apply rules of conduct in a non-discriminatory manner, to ensure that both parties to the litigation were treated justly and impartially and that private rights were vindicated and private wrongs remedied. The courts' primary focus was on the two parties to the litigation and how to balance their competing claims and interests.

Certainly, as in other civil litigation, sometimes the interests of a third party, the public, entered into the picture. Just as in contract law the courts, at times, would consider whether the public interest justified a breach of contract,[1] so in libel law the courts, at times, would consider whether the public interest justified publication of a defamatory statement. Thus developed such common law libel defenses as the fair report privilege and fair comment.[2] But overall the courts' focus remained firmly fixed on the parties to the litigation, the plaintiff and defendant, who were asking the court to mediate their private dispute.

New York Times v. Sullivan[3] changed that judicial focus. In *Sullivan* the U.S. Supreme Court told the judiciary that there was a critical third party whose interests the Constitution required to be considered in every libel action. That third party was the public, which under the first amendment was entitled to an

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[1] *See* 17 C.J.S. *Contracts* Section 211 (1963).

[2] *See Restatement (Second) of Torts* Section 611 (1977) for a discussion of the fair report or reporter's privilege and *Restatement of Torts* Section 606 (1938) for a discussion of fair comment. Note that the *Second Restatement*, declaring opinion to be constitutionally protected, has dropped its listing of fair comment as a common law defense. *See Restatement (Second)* Section 566 comment c.

[3] 376 U.S. 254 (1964).

"'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[4] Quoting a 1931 case in which the Court overturned the conviction of Yetta Stromberg for raising and saluting a Russian flag, the Supreme Court reminded the rest of the judiciary that "'a fundamental principle of our constitutional system'" is "'[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'"[5] The judiciary's responsibility to uphold and protect that fundamental constitutional principle extended not only to cases in which zealous governments prosecuted individual citizens for their allegedly dangerous speech, but also to cases in which individual citizens sued other citzens for their allegedly defamatory speech. The public's interest in an unfettered interchange of ideas does not diminish nor disappear simply because a legal action is labeled civil rather than criminal, the Court noted. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[6]

Although Justice Brennan never explicitly referred to the writings of philosopher Alexander Meiklejohn in his *Sullivan* opinion, many commentators found the theoretical base for the decision in Meiklejohn's self-governance theory of the first amendment.[7] Meiklejohn himself saw his theory being embraced by the Supreme Court in *Sullivan* and referred to the decision as "an occasion for dancing in the streets."[8] And Justice Brennan in a 1965 lecture observed that Meiklejohn's theory was reflected in his *Sullivan* opinion.[9]

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[4] 376 U.S. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[5] *Id.* (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

[6] *Id.* at 277.

[7] A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 1948. *See, e.g.* Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 *Harv. L. Rev.* 1 (1965); Comment, "Defamation of a Public Official: The *New York Times* case in Perspective," 15 *De Paul L. Rev.* 376 (1966); Comment, "The Limits of Political Speech: *New York Times v. Sullivan* Revisited," 14 *UCLA L. Rev.* 631 (1967); Note, "Free Speech and Defamation of Public Persons: The Expanding Doctrine of *New York Times Co. v. Sullivan*," 52 *Cornell L.Q.* 419 (1965); Pierce, "The Anatomy of an Historic Decision: *New York Times Co. v. Sullivan*," 43 *N.C.L. Rev.* 315 (1965).

The Meiklejohnian theory of the first amendment is firmly based on the premise of content discrimination, the idea that not all speech is equal under the Constitution. Speech relating to "issues with which voters have to deal," concerning "matters of public interest" or "the public welfare of the community" is entitled to greater, indeed absolute, protection under the Constitution, Meiklejohn argued.[10] "Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment" and is protected only under the less stringent provisions of the fifth amendment, Meiklejohn contended.[11] The justification for such content discrimination, according to Meiklejohn, is that the first amendment is essentially a tool in the self-governing process. "It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned not with a private right, but with a public power, a governmental responsibility."[12]

This fundamental Meiklejohnian premise of content discrimination in the application of the first amendment was the basis for the Supreme Court's *Sullivan* decision. The *New York Times* was entitled to the protection of the actual malice rule not because Commissioner Sullivan was an elected official who had, in effect, "asked for it" when he decided to run for office, nor because Sullivan was a prominent person who could call his own news conference to rebut the charges, but because the first amendment guaranteed the self-governing public that

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[8] Quoted in Kalven, "The New York Times Case: A Note on the 'Central Meaning of the First Amendment,'" 1964 *Sup. Ct. Rev.* 191, 221 n.125.

[9] Brennan, *supra* note 7.

[10] A. Meiklejohn, *supra* note 7, at 94.

[11] *Id.*

[12] Meiklejohn, "The First Amendment is an Absolute," 1961 *Sup. Ct. Rev.* 245, 255.

"*debate on public issues* should be uninhibited, robust, and wide-open."[13] But sometime, somehow between 1964 and 1974[14] the Supreme Court lost sight of the Meiklejohnian premise underlying the *Sullivan* ruling and began to search for content neutrality in its application of the first amendment to the law of libel.

This paper explores how and why the Court embarked on this misleading search for content neutrality in libel law and suggests how the Court can return to the "central meaning of the first amendment"[15] and its role as protector of the public interest in libel litigation. The paper begins with an overview of Meiklejohnian theory, then demonstrates its application in *Sullivan* and *Garrison v. Louisiana*.[16] Next the paper traces the Supreme Court's efforts to apply a doctrine of content neutrality to libel law by changing its focus from the subject matter of the discussion to the plaintiff's status. The paper demonstrates that this change in focus was accomplished through the application of common law, rather than constitutional, principles. The authors conclude that the Supreme Court should return to Meiklejohnian theory in the application of the first amendment by applying the actual malice rule to all discussions of matters of public concern. There are also adequate reasons for applying a higher fault standard to celebrities defamed during discussions of their private affairs. However, those reasons are based on traditional common law tort principles, and, therefore, such a rule should be a common law, not constitutional, requirement.[17]

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[13] 376 U.S. at 270 (emphasis added).

[14] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[15] *Sullivan*, 376 U.S. at 273.

[16] 379 U.S. 64 (1964).

[17] The authors fully recognize that much of state libel law is now statutory, rather than common, law. Even traditional common law defenses such as the fair report privilege and fair comment have been incorporated into statutes in some jurisdictions. Nonetheless, common law is used herein in recognition of the common law origins of the principles and as a simple shorthand phrase to refer to the non-constitutional aspects of the law of libel. *See* Sack, "Common Law Libel and the Press: A Primer," in Practising Law Institute, *Communications Law*, vol. 1, at 327 (1989).

Meiklejohnian Theory

Meiklejohn's first amendment theory flows naturally from the theory of democracy. In a democracy the citizens are the sovereigns, the rulers, and as such must have access to the information necessary to self-govern.[18] The first amendment is simply a tool to make democracy work. "Its purpose is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."[19]

Under Meiklejohnian theory, the primary beneficiary of first amendment freedoms is not the speaker, but the listener. "[T]he point of ultimate interest is not the words of the speakers, but the minds of the hearers."[20] The goal of the first amendment is an informed electorate, not "unregulated talkativeness."[21]

Meiklejohn unabashedly advocated content discrimination in the application of the first amendment. The philosopher saw speech as capable of being classified as either public or private. "When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses."[22] The first amendment freedom of speech, Meiklejohn contended, protects speech concerning self-government, "the issues which bear upon our common life."[23] However, private speech, which Meiklejohn saw as including such things as advertising and "a paid lobbyist fighting for the advantage of his client," was outside the purview of the first amendment.[24] Such speech was covered only by the much less protective mantle of the fifth amendment.[25] According to Meiklejohn, the first amendment's protection of public speech is absolute, while the fifth amendment's protection of private speech is qualified. "There is a 'freedom of speech' which the First Amendment declares to be non-abridgable. But there is also a 'liberty of speech' which the Fifth Amendment declares to be abridgable."[26]

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[18] A. Meiklejohn, *supra* note 7, at 25.

[19] *Id.* at 88.

[20] *Id.* at 25.

[21] *Id.*

[22] *Id.* at 24.

[23] *Id.* at 25.

Meiklejohn developed his self-governing theory in the midst of the Cold War. His key goal was to demonstrate that the "clear and present danger" test was inconsistent with the meaning and goals of the first amendment.[27] Meiklejohn's primary concern was direct government efforts at suppressing political speech under the guise of protecting the nation from clear and present dangers. He was not attempting to provide detailed analysis of government's role in protecting the citizen's first amendment interests in private-party litigation, but in articulating the first amendment's role in protecting those citizen interests when government was acting as the aggressor, the suppressor of expression.

Nonetheless Meiklejohnian theory fit easily into libel law, at least with regard to the *Sullivan*-type lawsuit. In fact, in 1961 Meiklejohn wrote:

> In case of private defamation, one individual does damage to another by tongue or pen; the person so injured may sue for damages. But in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made

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[24] *Id.* at 39.

[25] *Id.* at 38-39. While Meiklejohn's distinction between public and private speech has received considerable support from jurists and scholars, his perception of the role of the fifth amendment in the protection of free expression has been largely ignored. This paper will not address that portion of Meiklejohn's theory, although it is at least arguable that the Supreme Court, in applying a negligence requirement to defamatory speech involving private individuals, has, in effect, provided private speech with the due process protection of which Meiklejohn wrote.

[26] *Id.* at 38.

[27] *Id.* at 34.

> in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if the citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structure of the Constitution. These are "public" issues concerning which, under our form of government, he has authority, and is assumed to have competence to judge.[28]

Note that Meiklejohn saw the attack on the candidate protected not because of the candidate's status as a public individual who subjected himself or herself to public scrutiny and criticism through voluntary entry into the public spotlight, nor because the candidate had access to the channels of communication to rebut the charges. Instead, Meiklejohn categorized the verbal attack on the candidate as a *public issue*, in the same category as condemnation of the policies of government or structure of the Constitution. Nor did Meiklejohn in his first example in that passage ask if the individual defamed was Lucille Ball or Milton Berle (arguably the early 1960s versions of Carol Burnett and Johnny Carson) before declaring the first amendment inapplicable to the private defamation. The first example bore no relationship to the "business of governing" and, therefore, was not part of what the first amendment was designed to protect.

New York Times v. Sullivan: A Content-Based Approach to Libel

Whether intentionally or not, Justice Brennan followed Alexander Meiklejohn's lead in *Sullivan*.[29] Brennan declared that the allegedly defamatory advertisement, "as an expression of grievances and protest on one of the major

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[28] Meiklejohn, *supra* note 12, at 259.

[29] Indeed, it appears as if the most significant influence on Justice Brennan's opinion was the brief filed by Professor Wechsler representing the *New York Times*. *See* Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,'" 83 *Colum. L.Rev.* 603, 603-607 (1983). The only direct reference to Meiklejohn came in a footnote in Justice Black's concurrence. 376 U.S. 254, 297 n.6.

public issues of our time, would seem clearly to qualify for the constitutional protection."[30] In perhaps the most-often quoted passage in *Sullivan*, Brennan referred to "a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open."[31] More than a quarter of century of libel litigation and commentary have succeeded in apply a gloss to the *Sullivan* decision, however. The focus of *Sullivan* has been shifted from "debate on public issues" to the plaintiff's status.

A careful analysis of the text of the *Sullivan* decision demonstrates that the Court's ruling was based upon the subject matter of the advertisement, not the status of the plaintiff, who, the Court noted, was not even identified in the ad.[32] Brennan's opinion for the Court and the two concurrences are framed in terms of the protection afforded criticism of the "official conduct" of government officials. In the three opinions, the term "official conduct" or a synonym, such as "official duties," "the way public employees do their jobs," and "official capacity," is used no fewer than 44 times. In Brennan's opinion alone "official conduct" or a synonym is used at least 23 times.

Seldom in any of the opinions is the term "public official" used without the modifying reference to official conduct. Excluding his discussion of government officials' absolute privilege from libel suits,[33] Brennan used the term "public officials" or "government officials" alone only seven times, and a majority of those uses occur in sentences directly adjacent to ones containing the "official conduct" language.[34] Justice Black's concurrence also contains seven references to "officials" or a synonym not accompanied by the limiting reference to official conduct. However, most of those references link criticism of public officials to discussion of public affairs as Black argued for absolute protection for "discussions of public affairs and public officials."[35] Likewise, Justice Goldberg, in his concurrence supporting "unconditional privilege to criticize official conduct,"[36] seldom used the term public official unmodified. That Justice Goldberg saw the subject matter of the report, not the status of the plaintiff, as the critical factor in determining first amendment protection is underscored by his effort to distinguish private conduct from official conduct. "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen," he wrote.[37]

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[30] 376 U.S. at 271 (emphasis added).

[31] *Id.* at 270 (emphasis added).

[32] "We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' respondent." *Id.* at 288.

[33] *Id.* at 282-83.

The Court's description of the advertisement that gave rise to the lawsuit also demonstrates its subject-matter focus. As noted above, Brennan described the ad as addressing "one of the major public issues of our time."[38] In another place he said, "It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[39]

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[34] In addition, Brennan's opinion contains three references to "public men," all in direct quotations, and three references to candidates for public office, all in the discussion of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), in which the Kansas Supreme Court applied an actual malice requirement to a libel action brought by a candidate for state attorney general. Brennan introduced the discussion of *Coleman* by noting that the libel suit arose from publication of an article "purporting to state facts relating to his official conduct in connection with a school-fund transaction." 376 U.S. at 280.

[35] *Id.* at 297 (Black concurring).

[36] *Id.* at 298 (Goldberg concurring).

[37] *Id.* at 301 (Goldberg concurring).

[38] *Id.* at 271.

[39] *Id.* at 266.

The text of the opinions, not to mention the historical context in which the decision was handed down,[40] leaves little doubt that the justices were striving to protect what Sullivan and scores of other Southern leaders were trying to squelch — debate about the burning public issue of the day, racial justice and civil rights, not allegedly false and defamatory statements about an unnamed Montgomery commissioner.

The Supreme Court continued to follow a Meiklejohnian approach and focus on the subject matter of the expression in the next libel case it decided eight months later, *Garrison v. Louisiana*.[41] *Garrison* was a criminal libel action in which the Louisiana Supreme Court found that defendant's statements did not qualify as criticism of official conduct. During a press conference, District Attorney Garrison had referred to "'racketeer influences on our eight vacation-minded judges.'"[42] The Louisiana court concluded the statements "are not criticisms of a court trial or of the manner in which any one of the eight judges conducted his court when in session. The expressions charged contain personal attacks upon the integrity and honesty of the eight judges."[43]

If in *Sullivan* the Court had meant the focal point to be the status of the defamed individual, here was the perfect opportunity to say so. The judges in *Garrison* were clearly public officials. Instead the Court took pains to explain why Garrison's statements "concerned the judges' conduct of the business of Criminal District Court."[44] In his discussion of *Sullivan* in the opinion of the Court, Justice Brennan continually referred to the case as involving criticism of official conduct.[45] The opinion refers to the need for "[d]ebate on public issues" and "discussion of public affairs" and contains perhaps the most succinct possible summary of Meiklejohnian theory: "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[46]

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[40] *See* Lewis, "Annals of Law, The Sullivan Case," *New Yorker*, Nov. 5, 1984, at 52.

[41] 379 U.S. 64 (1964).

[42] *Id.* at 66.

[43] *Id.* at 76.

[44] *Id.*

On the Road to Content Neutrality

Rosenblatt v. Baer,[47] decided in 1966, is where the Supreme Court started straying from its Meiklejohnian path and heading toward the road of content neutrality in libel law by focusing on the plaintiff's status. In the first portion of the opinion of the Court, which addresses whether the offending column was "of and concerning" Baer, the focus remains clearly on the subject matter of the report. Justice Brennan characterized the column as "only an impersonal discussion of government activity" and said it was irrelevant whether Baer was a public official or not. As a member "of the group responsible for the conduct of this governmental operation" (a county-owned recreation area), plaintiff had to show "that the attack was read as specifically directed at" him, Brennan wrote. His failure to do so, Brennan continued, was "tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient."[48]

However, after finding that the judgment on behalf of Baer had to be reversed for lack of identification, Brennan went on to address the applicability of the actual malice requirement. He began by noting that the column "manifestly discusses the conduct of operations of government" and refers to the "discussion of public affairs," but then Brennan shifted focus to the status of plaintiff: "The question is squarely presented whether the 'public official' designation under *New York Times* applies."[49]

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[45] *Id.* at 67.

[46] *Id.* at 74-75.

[47] 383 U.S. 75 (1966).

[48] *Id.* at 81-83.

Justices Black and Douglas both filed separate opinions, taking issue with Brennan's focus on the plaintiff's status. "The question is whether a public *issue*, not a public official, is involved," wrote Douglas.[50] Justice Black agreed: "The right to criticize a public agent engaged in public activities cannot safely, and should not, depend upon whether or not that agent is arbitrarily labeled a 'public official.'"[51]

Justice Harlan, who the following year wrote the Court's opinion in *Curtis Publishing Co. v. Butts*,[52] which led the Court even further toward the road of content neutrality, concurred in that portion of Brennan's opinion emphasizing the necessity of determining Baer's status as a public official but disagreed with Brennan that this case involved "impersonal criticism of government."[53]

In *Butts* and its companion case, *Associated Press v. Walker*, the theme of content neutrality clearly began to surface. Despite his recognition that "libel remains premised on the content of speech," Justice Harlan referred to a need for "ideologically neutral, and generally applicable regulatory measures." The fact that libel is premised on content, said Harlan, means "some antithesis between freedom of speech and press and libel actions persists." To resolve this antithesis, the Court's principal focus must be on what Harlan referred to as "the conduct element."[54] In justifying judicial focus on whether the defendant engaged in

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[49] *Id.* at 83-84.

[50] *Id.* at 91 (Douglas concurring, emphasis in original).

[51] *Id.* at 95 (Black concurring and dissenting).

[52] 388 U.S. 130 (1967).

[53] 383 U.S. at 100 (Harlan concurring and dissenting).

[54] 388 U.S. at 152.

"improper conduct," Harlan explicitly sounded the content neutrality theme for the first time in a Supreme Court libel case:

> Impositions based on misconduct can be neutral with respect to the content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.[55]

In *Butts* the Court continued to recognize its duty to protect the public interest in the free flow of information, as demonstrated in the quotation above, and continued to refer to discussion of public affairs as constitutionally protected. However, Justice Harlan needed to justify extension of the *Sullivan* rule to two plaintiffs who were not government employees, including one who ostensibly played little or no role in the conduct of governmental affairs. Harlan acknowledged that "[t]hese actions cannot be analogized to prosecutions for seditious libel."[56]

A Meiklejohnian approach to the first amendment clearly would have permitted application of the actual malice requirement to retired Major General Edwin Walker. Walker conceded that he had been participating in the debate of a public issue,[57] the same public issue that the Supreme Court in *Sullivan* had deemed a "matter of the highest public interest and concern" — civil rights.

But applying the *Sullivan* subject-matter approach to the *Butts* case, involving a Saturday Evening Post article alleging a fixed football game, was much more problematic. No doubt a football game between Alabama and Georgia was, as Court of Appeals Judge Rives asserted, "of great interest to the public."[58] But something in which the public is interested does not necessarily equate with a matter of public interest as the term was used by Meiklejohn and Justice Brennan in *Sullivan*.[59] Thus, Justice Harlan abandoned a search for constitutional justification for applying the *Sullivan* standard to the *Walker* and *Butts* cases and reverted to basic tort law, fashioning the dispute in conventional civil law terms and losing sight of the public's interest.

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[55] *Id.* at 153.

[56] *Id.* at 154.

[57] The *Walker* case resulted from an AP story filed during the riot that erupted as federal marshals sought to enforce a court decree ordering the enrollment of the first black student at the University of Mississippi. "Walker admitted his presence on the campus and conceded that he had spoken to a group of students. He claimed, however, that he had counseled restraint and peaceful protest, and exercised no control whatever over the crowd which had rejected his plea." *Id.* at 141.

> We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. . . . In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants' activities. . . . The courts have also, especially in libel cases, investigated plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense.[60]

Justice Harlan found support for this approach not in *Sullivan*, *Garrison* or *Rosenblatt*, nor in the first amendment itself, but in Prosser's *The Law of Torts*. Thus Harlan went on to consider whether Butts and Walker "would have been labeled 'public figures' *under ordinary tort rules*."[61] The fact that both "commanded sufficient continuing public interest" and had access to the channels of mass communication resulted in a finding that both were public figures.[62] After again reiterating that the status inquiry relative to Butts and Walker rested on "the principles of liability which are of general applicability in our society," Harlan made the leap from tort law to constitutional law, declaring, "[L]ibel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard."[63]

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[58] *Id*. at 139.

[59] In light of recent revelations about the impact of intercollegiate athletics on the the educational mission of public colleges and universities and the public's clear interest in the operation of its government-financed educational institutions, an argument could be made that the football-fix story was indeed a discussion of public affairs. *See, e.g.*, P. Golenbock, *Personal Fouls* (1989). Plaintiff failed to make such a claim, however, at trial, 388 U.S. at 137, 139, and the Supreme Court failed to follow such mode of analysis on appeal.

[60] 388 U.S. at 154 (citations omitted).

[61] *Id*. (emphasis added).

As will be argued later in this paper, Harlan's contention that tort law, because of its basic purpose of balancing private rights and interests, should distinguish between public and private plaintiffs was absolutely correct. But Harlan was, to use modern vernacular, in a bind as to how to impose such a rule. The tort aspects of libel law are subject to state jurisdiction. The federal judiciary cannot mandate what a state's tort law, whether of common law or statutory origins, will be. The only mechanism the Supreme Court possessed for altering the tort law of the states was to declare the change a constitutional imperative. Thus, to impose upon states a fault standard in public figure libel actions, Harlan was forced to ignore the "central meaning of the First Amendment"[64] and construct a false symmetry between the discussion of "one of the major public issues of our time"[65] in *Walker* and a collegiate football game in *Butts*.

Only three other justices joined in Harlan's opinion for the Court. While the remaining five justices criticized Harlan's opinion, primarily because of his reliance on a "highly unreasonable conduct" standard of fault,[66] none explicitly questioned his use of tort law principles to impose constitutional requirements on state libel law nor his efforts to impose some degree of content neutrality. Chief Justice Warren, noting that "[i]ncreasingly in this country, the distinctions between governmental and private sectors are blurred," simply saw "no basis in law, logic, or First Amendment policy" for differentiating between public officials and public figures.[67] The thrust of Justice Brennan's opinion, joined by Justice White, was that the actual malice rule applied in both cases,[68] while Justice Black's opinion, joined by Justice Douglas, reiterated the theme of unconditional privilege. Interestingly, perhaps because he saw the problems inherent in fitting the *Butts* case into the Meiklejohnian category of political speech, Black dropped his reference to public affairs discussions and declared that the Court should "adopt a rule to the effect that the First Amendment intended to leave the press free from the harassment of libel judgments."[69]

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[62] *Id.* at 155.

[63] *Id.*

[64] *Sullivan*, 376 U.S. 284, 273.

[65] *Id.* at 271.

[66] 388 U.S. at 155.

In *Rosenbloom v. Metromedia*[70] Justice Brennan made a valiant effort to steer the Court back onto the Meiklejohnian path in libel law. Yet, the majority of his brethren seemed to prefer the detour taken in *Butts*. "Drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees," Brennan argued. The first amendment's function, he said, was "to encourage ventilation of public issues."[71]

> Further reflection over the years since *New York Times* was decided persuades us that the view that the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. . . . Voluntarily or not, we are all "public" men to

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[67] *Id.* at 163 (Warren concurring).

[68] *Id.* at 172-74 (Brennan concurring and dissenting).

[69] *Id.* at 172 (Black concurring and dissenting).

[70] 403 U.S. 29 (1971).

[71] *Id.* at 45-46.

> some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. . . . [S]uch a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the are of public or general concern.[72]

Justice Brennan's comments were, of course, prophetic, as evidenced by application of the actual malice standard to an article commenting on a comedienne's behavior in a restaurant[73] and its inapplicability to a U.S. senator's criticism of expenditures of federal tax dollars.[74]

Belatedly, Brennan contended that "an alleged 'fix' of a college football game was a public issue," as were "federal efforts to enforce a court decree ordering the enrollment of a Negro student in the University of Mississippi."[75] But his efforts to convert *Butts* into a subject-matter-based decision were unconvincing as he provided no analysis or explanation of how the magazine article contributed to self-governance. He did a convincing job, however, of demonstrating why George Rosenbloom's brush with the state's obscenity law did constitute a matter of legitimate public concern.

> The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: the public has an interest in seeing that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression.[76]

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[72] *Id.* at 47-48.

[73] Burnett v. National Enquirer, 144 Cal. App.3d 991 (1983), *appeal dismissed*, 465 U.S. 1014 (1984).

[74] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[75] 403 U.S. 29, 42.

[76] *Id.* at 43.

But Justice Brennan's expansive language in *Rosenbloom* appeared to alarm some of his colleagues. Justice White wrote that Brennan's reasoning would "extend constitutional protection to false and damaging, but non-malicious, publications about such matters as the health and environmental hazards of widely used manufactured products, the mental and emotional stability of executives of business establishments, and the racial and religious prejudices of many groups and individuals."[77] White also complained that Brennan's approach "rests almost entirely on theoretical grounds."[78] Justice Harlan once again asserted his preference for decisions based upon plaintiff's status, but, as in *Butts*, his reasoning had little to do with the central meaning and function of the first amendment. He wrote of the availability of alternative remedies for public persons — their presumed access to the channels of communication — and introduced the doctrine of assumed or incurred risk, reminiscent of basic tort law,[79] as he wrote of the public person's voluntary assumption of the risk of being subjected to defamatory falsehoods.[80]

Justice Marshall's dissent was perhaps the most important for the subsequent development of libel law. It emphasized the content-neutrality theme, which had been introduced by Justice Harlan in *Butts* and which served as the underpinning for Justice Powell's opinion three years later in *Gertz v. Robert Welch, Inc.*[81] According to Marshall, the danger of Brennan's approach was that courts would have to become involved in content-based decisions. "[C]ourts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent."[82] What Marshall ignored, however, was the danger to the public interest in free and open debate on matters of public concern that judicial refusal to determine what constitutes information relevant to self-government would create.

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[77] *Id.* at 59 (White concurring).

[78] *Id.* at 60 (White concurring).

[79] The doctrine of assumed risk is related, but not identical, to the concept of contributory negligence. It is based on the concept of consent and holds, in essence, that a defendant may not be liable for negligence if the plaintiff intentionally exposed himself or herself to a known danger. *See* 65A C.J.S. *Negligence* Sections 117, 174 (1966).

[80] 403 U.S. at 70 (Harlan dissenting).

[81] 418 U.S. 323 (1974).

The Content Neutrality Facade

In *Gertz* Justice Powell, writing for the majority, abandoned recognition of the public's interest in the application of the first amendment to libel law. Instead he firmly embraced Marshall's content-neutrality theme and based the decision squarely on tort, rather than constitutional, law principles. In the first paragraph of the opinion, Powell alerted readers that the Court had forsaken the public interest in debate on public issues and described the case solely in terms of a conflict between a publisher and "a private citizen."[83] After acknowledging that the lower courts had grappled with the question of whether the allegedly defamatory article was entitled to constitutional protection as a discussion of a matter of public interest, Powell again announced the Court's abandonment of the public's interest by framing the issue in terms of "a newspaper or broadcaster" and "an individual who is neither a public official nor a public figure."[84]

The Court's decision to reject Justice Brennan's *Rosenbloom* focus on the subject matter of the report was based on two grounds: common law principles governing the appropriate manner for balancing private interests and the need for content-neutral decisions in applying the first amendment to regulatory measures impinging on freedom of expression. Each of the justifications the Court presented for refusing to apply the actual malice requirement to a private individual involved in the discussion of a matter of public interest was a pragmatic rationale, grounded in common law principles of fairness, justice and equity and focusing solely on the relative positions of the two parties to the litigation. Powell noted that the first remedy of any victim of defamation, like the victim of any tortious conduct, should be "self-help." But because public persons "enjoy significantly greater access to the channels of effective communication, . . . [p]rivate individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater."[85] Next Powell returned to the assumed risk doctrine in tort law.[86] Public people "must accept certain necessary consequences of (their) involvement in public affairs," and "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Private individuals have neither voluntarily contributed nor consented to their exposure to public discussion and thus "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[87]

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[82] 403 U.S. at 79 (Marshall dissenting, citation omitted).

[83] 418 U.S. at 325.

[84] *Id.* at 332.

Having established tort law bases for focusing on the plaintiff's status while ignoring the public's interest, Powell then cited Justice Marshall's *Rosenbloom* dissent to support the proposition that judges ought not be assigned the task of making content-based decisions about "'what information is relevant to self-government.'"[88] Conspicuously absent throughout the entire decision is any discussion of the central meaning of the first amendment and role of robust debate of public issues in a self-governing society. Powell concluded his section refusing to apply the actual malice rule to private individual suits resulting from public issue discussions by again framing the issue solely in terms of a private, two-party dispute. The "competing concerns" involved in the case, he said, were "the legitimate state interest in compensating private individuals for wrongful injury to reputation" and the need to shield "the press and broadcast media from the rigors of strict liability for defamation."[89]

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[85] *Id.* at 344.

[86] *See supra* note 79 and accompanying text.

[87] *Id.* at 344-45.

[88] *Id.* at 346.

In *Rosenbloom* Justice White complained that Brennan's plurality opinion was based "almost entirely on theoretical grounds."[90] In *Gertz* Justice Powell's opinion was virtually devoid of constitutional theory, a fact recognized by Justice Blackmun when, in his concurrence, he said the majority "thus withdraws to the factual limits of the pre-*Rosenbloom* cases." Blackmun found "some illogic" in this approach, acknowledged that he still adhered to the views expressed by Brennan in *Rosenbloom*, but admitted he concurred in Powell's opinion because his vote was "needed to create a majority"![91] Despite Justice Brennan's vigorous dissent, in which he again reiterated the argument that focusing on the plaintiff's status "'bears little relationship either to the values protected by the First Amendment or to the nature of our society,'"[92] Blackmun's desire to create a majority and thereby eliminate the "unsureness engendered by *Rosenbloom*'s diversity"[93] allowed the Court to impose upon the law of libel the wholly unsuitable facade of content neutrality.

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[89] *Id.* at 348.

[90] 403 U.S. 29, 60 (White concurring).

[91] 418 U.S. 323, 353-54 (Blackmun concurring).

[92] *Id.* at 364 (Brennan dissenting, quoting *Rosenbloom*, 403 U.S. at 47).

[93] *Id.* at 354 (Blackmun concurring).

For a facade — and an unsuitable one under the central meaning of the first amendment — it surely was, as subsequent cases so clearly demonstrated. Two years after *Gertz*, in a case involving the constitutionality of a zoning ordinance aimed at regulating adult theaters, Justice Stevens, in an opinion joined by four other justices, made it plain that first amendment protection often depends on the content of speech and that justifying constitutional protection for libel requires content discrimination.

> Even within the area of protected speech, a difference in content may require a different governmental response. . . . Implicit in the (*New York Times v. Sullivan*) opinion is the assumption that if the content of the newspaper article had been different — that is, if its subject matter had not been a public official — a lesser standard of proof would have been adequate.
>
> In a series of later cases, in which separate individual views were frequently stated, the Court addressed the broad problem of when the *New York Times* standard of malice was required by the First Amendment. Despite a diversity of opinion . . . , a common thread which ran through all the opinions was the assumption that the rule to be applied depended on the content of the communication.[94]

In the libel decisions that followed *Gertz* the Court found it impossible to maintain content neutrality, although it continued to operate behind that facade. In *Time, Inc v. Firestone*[95] the Court labored to find a way to avoid applying the actual malice requirement to Mary Alice Firestone, "prominent among the '400' of Palm Beach Society," an "active" member of the "sporting set," and former wife of tire magnate Russell Firestone. She employed a clipping service to keep track of her mentions in newspapers, "granted several interviews to the news media during the divorce action" and, according to the Florida courts, her marital problems were "well-known" and her divorce suit was a "veritable *cause celebre* in social circles across the country."[96] Had the Court not abandoned the central meaning of the first amendment in *Gertz*, it would have had little difficulty finding Mrs. Firestone exempt from the constitutional actual malice requirement. Regardless of her position as a public figure, her status as a "celebrity,"[97] the Firestone divorce simply was not an issue of self-governing importance. The public may have been interested in Mary Alice and Russell's marital difficulties, but the fascinating details of their marriage and divorce clearly were not a matter of public interest.

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[94] Young v. American Mini Theatres, Inc., 427 U.S. 50, 66-68 (1976) (footnote omitted).

[95] 424 U.S. 448 (1976).

But the Court had abandoned focus on the public's interest under the first amendment and was focusing instead on the plaintiff's status. Thus it sought to determine if Mrs. Firestone was a limited public figure who had thrust herself to the forefront of a public controversy. But, of course, determining whether the offending report dealt with a public controversy into which plaintiff had injected herself involved making a subject-matter determination. Conceding that "the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public," the Court said public controversies could not be equated with "all controversies of interest to the public." The Firestone divorce did not qualify as a public controversy.[98]

Justice Marshall, the preeminent proponent of content neutrality, saw through his colleagues' facade and berated them for returning to the same subject-matter test they had ostensibly rejected in *Gertz*, judicial inquiry into "'the legitimacy of interest in a particular event or subject.'"[99]

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[96] Firestone v. Time, Inc., 271 So.2d 745, 751 (Fla. 1972).

[97] *See* Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1294 (D.C. Cir.), *cert. denied*, 429 U.S. 1062 (1980).

[98] 424 U.S. at 454.

[99] *Id.* at 488 (Marshall dissenting, quoting *Rosenbloom*, 403 U.S. at 79).

The folly of attempting to ignore the public's interest in the application of the first amendment to libel law was perhaps best illustrated in the 1979 case of *Hutchinson v. Proxmire*.[100] Scientist Ronald Hutchinson did not have to prove actual malice in his libel action against Wisconsin Sen. William Proxmire, said the Court, because he was not a limited public figure. First, the Court contended that the public controversy Proxmire identified as the subject of his statements, "concern about general public expenditures," was insufficiently "particular" to satisfy the public controversy requirement.[101] Besides, even if the Court accepted Proxmire's definition of the public controversy, the researcher whose work had been cited as an example of wasteful government spending "did not thrust himself or his views into the public controversy to influence others. . . . Hutchinson at no time assumed any role of public prominence in the broad question of concern about expenditures," and the Court could not "agree that Hutchinson had such access to the media that he should be classified a public figure."[102] Not once did the Court ask whether the type of information Proxmire was discussing was critical to the citizens in a self-governing society nor whether Proxmire's statements were part of uninhibited, robust and wide-open debate on public issues.

In *Wolston v. Reader's Digest*[103] the Court virtually admitted it was using the subject-matter test it had discredited in *Gertz*, but it still purported to be focusing on the plaintiff's status. In determining whether Wolston, whom a Reader's Digest book accused of being a Soviet spy, was a limited public figure because of his failure to respond to a subpoena from a federal grand jury investigating Soviet espionage in 1958, the Court drew a distinction between matters in which the public is interested and matters of public interest. "A libel defendant must show more than mere newsworthiness" to warrant protection under the actual malice rule, Justice Rehnquist said, writing for six members of the Court.[104]

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[100] 443 U.S. 111 (1979).

[101] *Id.* at 135.

[102] *Id.* at 135-36.

[103] 443 U.S. 157 (1979).

A Return to Content Discrimination

Six years after *Hutchinson* and *Wolston* the Court overtly returned to content discrimination in its application of first amendment principles to libel law. This time, however, a subject matter standard was used to restrict constitutional protection for defamatory statements. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*[105] Justice Powell, writing for the plurality, held that the rule enunciated in *Gertz* conditioning recovery of presumed or punitive damages on a showing of actual malice was inapplicable in cases that did "not involve matters of public concern."[106] In returning to subject-matter-based application of the first amendment, Justice Powell also returned to the core meaning of the first amendment: the need to protect debate on public issues. However, Powell provided no definition of what constituted matters of public concern, merely saying that the determination depended on the "content, form and context" of the communication.[107] Ironically Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, criticized the plurality for returning to a subject-matter standard, arguing that the *Gertz* rule had not been conditioned on a distinction between speech of public concern and speech of private concern but was meant to apply in all defamation cases.[108]

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[104] *Id.* at 167-68.

[105] 472 U.S. 749 (1985).

[106] *Id.* at 763.

[107] *Id.* at 761.

A year later, the Court again used a public concern standard to establish a new constitutional requirement in libel law. In *Philadelphia Newspapers, Inc. v. Hepps*[109] Justice O'Connor, writing for a five-member majority, said the first amendment required private plaintiffs to prove the falsity of the allegedly defamatory statements in cases involving "speech of public concern."[110] *Hepps* involved an allegation that plaintiffs were linked to organized crime, a subject the majority had no difficulty defining as a matter of public concern. However, as in *Dun & Bradstreet*, the Court provided no conceptual definition of the term.

The results of the Court's half-hearted return to content discrimination in libel law are confusion and inconsistency. The Court's efforts to maintain content neutrality in the application of fault standards, while practicing content discrimination in determining the availability of presumed and punitive damages and deciding whether the plaintiff must prove falsity have absolutely no basis in constitutional theory. Furthermore, they make no sense from a practical standpoint. The purpose of the first amendment is to ensure the public enjoys the benefits of uninhibited, robust and wide-open debate on public issues. The imposition of rigorous fault standards is by far more effective in accomplishing this goal than the damages rule of *Dun & Bradstreet* or the falsity rule of *Hepps*. Removing the spectre of punitive damages awards seems an inadequate impetus to engage in robust debate of public issues in today's world of libel litigation, where the cost of merely defending a libel action through trial to the point of a damages decision is likely to well exceed the $350,000 in presumed and punitives damages the jury awarded Greenmoss Builders.[111] Instead, debaters of public issues need the protection of knowing that judges will recognize that "erroneous statement is inevitable in free debate"[112] and protect unintentional and non-reckless falsehoods through application of the actual malice requirement at the summary judgment stage.

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[108] *Id.* at 775-76 (Brennan dissenting).

[109] 475 U.S. 767 (1986).

[110] *Id.* at 776-77.

Nor is the *Hepps* rule adequate protection for public debate. Justice O'Connor herself conceded that who bore the burden of proof of truth or falsity became important only in those cases in which the evidence was ambiguous,[113] an unknown, but likely small, percentage of libel cases. Furthermore, deciding whether a plaintiff has adequately borne his burden of proving a defamatory statement false would be a factual decision for a jury. Basing protection for debate of public issues on the *Hepps* rule again requires the defendant to undergo the costly burden of a trial.[114] As O'Connor noted, public officials and figures already bore the burden of proving falsity as part of their actual malice requirement. Thus, extending the actual malice rule to all debate on public issues, regardless of the plaintiff's status, would have the same effect as *Hepps* relative to the proof of falsity.

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[111] *See, e.g.*, Massing, "The libel chill: How cold is it out there," *Columbia Journalism Review*, May/June 1988, at 31.

[112] New York Times v. Sullivan, 376 U.S. 254, 271 (1964).

[113] 475 U.S. at 776.

[114] It is, of course, possible that judges at the pretrial stage could find inadequate evidence of falsity and, therefore, enter summary judgment for the defendant. Although we have no empirical support for our opinion, it appears to the authors that judges would be much less likely to take truth-falsity decisions out of the hands of juries than they are to take actual malice determinations away from juries. It seems to us that deciding the truth or falsity of a statement would appear to be more within the purview of the "reasonable" person on the jury, like determining negligence, than is determining the presence of the much more complex legal standard of actual malice.

The Content Neutrality Doctrine in Time, Place and Manner Restrictions

Determining why the Court decided to forsake the content discrimination approach to libel law, an approach firmly grounded in first amendment theory, is, of course, an impossible task. Perhaps some justices had serious reservations about judicial determination of what the public needed to know to engage in self-government. Perhaps some were experiencing qualms about excessive federal intrusion into areas of law previously reserved exclusively for the states. Perhaps others were convinced that private reputational rights were being undervalued.

Regardless of the reasons, what is clear is that the Court lost sight of the central meaning of the first amendment as articulated in *Sullivan* in its search for content neutrality in libel law. One possible explanation for this deviation from first amendment theory is the direction the Court was taking in another critical first amendment area. During the 1960s and 1970s, at the same time it was struggling with developing first amendment standards in libel law, the Court was also developing first amendment standards to apply to time, place and manner restrictions on speech. Municipal licensing ordinances were nothing new to the Court. As early as 1941 the Court had declared that the Constitution did not prohibit a municipality from regulating the time, place and manner of use of its streets "without unfair discrimination."[115]

While the early cases dealt primarily with efforts by Jehovah's Witnesses to spread their religious messages,[116] the 1960s cases bore a startling resemblance to *Sullivan*. They represented yet another effort by Southern officials to use the law to squelch discussion of civil rights. In two 1965 companion cases, both involving convictions resulting from civil rights demonstrations, the Court declared application of time, place and manner restrictions unconstitutional because they discriminated on the basis of content.[117] Thus, while in one area of law, libel, the Court had used a content discriminatory approach to protect discussion of civil rights, the following year it employed the opposite approach, content neutrality, to achieve the same result in the area of time, place and manner restrictions.

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[115] Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

[116] *See id*. and Poulos v. New Hampshire, 345 U.S. 395 (1953).

In 1972, the year after he had decried judicial evaluation of the content of defamatory speech in his *Rosenbloom* dissent, Justice Marshall presented what was to-date the most articulate and well-developed argument for content neutrality in time, place and manner restrictions. Earl Mosley, who for seven months had been picketing a Chicago high school with a sign charging the school with racial discrimination, challenged a newly enacted municipal ordinance banning picketing, except "peaceful picketing of any school involved in a labor dispute," during certain hours near schools. The central theme of Marshall's opinion declaring the ordinance a violation of the first amendment was content neutrality. "The first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[118]

Marshall, it appears, may have sought to carry his content-neutrality theme over to the area of libel, a singularly inapproriate transference of principles. Content neutrality is a proper requirement for the first amendment to impose on time, place and manner restrictions, which are supposed to be designed to serve some significant governmental interest, like public safety, peace or aesthetics. They are, to use Professor Tribe's language, aimed at the noncommunicative impact of expression.[119] The justification for upholding such regulations, even if they have some effects on the communicative impact of expression, is that such effects are only incidental to the regulations' primary purposes of protecting other significant societal interests. But in the area of libel, regulations are specifically and directly designed to control the communicative impact of messages. As Justice Harlan said in *Butts*, "[L]ibel remains premised on the content of speech."[120] Regulating content is the *raison d'etre* of libel law. Thus, attempting to engage in content-neutral analysis in the area of libel is nonsense, a denial of the fundamental purpose of the tort.

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[117] Cox v. Louisiana, 379 U.S. 536 (1965); Cox v. Louisiana, 379 U.S. 559 (1965).

[118] Chicago Police Department v. Mosley, 408 U.S. 92, 95 (1972).

[119] L. Tribe, *American Constitutional Law* Section 12-2, at 582 (1978).

Reconciling Constitutional and Common Law Principles in the Law of Libel

Decisions impacting on freedom of speech and of the press must be grounded in the enduring base of constitutional theory, Justice White's comment in *Rosenbloom* notwithstanding.[121] First amendment theories abound,[122] but none has had the influence and impact of Meiklejohn's self-government theory. Meiklejohn's identification of the core meaning of the first amendment as protection of political speech was the basis for the constitutionalization of libel law in *Sullivan* and ought to continue to serve as the theoretical framework for first amendment application to libel law.

The first amendment requires content discrimination in the area of libel. Only by focusing on the subject matter of the communication can courts fulfill their responsibility to protect the public interest in the application of libel laws. Thus determination of whether the constitution requires application of the actual malice rule in a libel case should rest upon the content of the communication, whether it is "speech concerning public affairs . . . the essence of self-government,"[123] not upon the prominence, notoriety or media access of the plaintiff. Admittedly, determining what constitutes discussion of public issues, speech concerning public affairs or political speech will not always be an easy matter, but neither is determining who qualifies as a public official or figure, what constitutes a public controversy or what constitutes knowing or reckless falsification. Clearly the definition of public affairs must be broader than that proposed by Judge Bork — speech dealing "explicitly, specifically and directly with politics and government."[124] Such a narrow definition ignores both the nature of American society and the factors that influence political decisionmaking. Supreme Court justices and legal scholars have recognized that far more than explicit discussion of politics and government impact on the political life of the nation. As Justice Brennan noted in *Rosenbloom*:

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[120] 388 U.S. 130, 152 (1967).

[121] *See supra* note 78 and accompanying text.

[122] *See, e.g.*, T. Emerson, *The System of Freedom of Expression* (1970); Redish, *Freedom of Expression: A Critical Analysis* (1984); L. Tribe, *supra* note 119; *Baker*, "Scope of the First Amendment Freedom of Speech," *25 UCLA L. Rev.* 964 (1978); Blasi, "The Checking Value in First Amendment Theory," 1977 *Am. Bar Found. Research J.* 521 (1971); Karst, "Equality as a Central Principle in the First Amendment," 43 *U. Chi. L. Rev.* 29 (1975).

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and qualify of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense.[125]

Meiklejohn himself refused to draw a rigid boundary to the absolute first amendment protection he proposed for speech serving the self-government value. The citizens, he said, are not to be "denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to" the issue of self-government.[126] He proposed protection for all types of expression that would help us in making up "our minds on issues which affect the general welfare" — the "vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument."[127] Under Meiklejohn's theory, the first amendment is a critical instrument in the democratic process; thus any information that might aid the voter in reaching wise decisions is deserving of first amendment protection.

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[123] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[124] Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1, 26 (1971).

[125] Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971).

> [T]here are many forms of thought and expression within the range of human communication from which voters derive the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgement of their freedom.[128]

Meiklejohn then listed four specific categories of communication that contribute to the self-governing process: education, philosophy and the sciences, literatures and the arts and "[p]ublic discussions of public issues."[129]

In sum, Justice Brennan was correct in *Rosenbloom*. The focus for determining first amendment protection must be on the subject matter of the report, not the status of the plaintiff, for the public's interest in maintenance of the public welfare does not depend on "the participant's prior anonymity or notoriety."[130]

The courts, of course, have recognized this need to evaluate the subject matter of allegedly defamatory communications in their definitions of public officials and public figures. In defining the term public official in *Rosenblatt v. Baer* the Supreme Court said, "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position to significantly influence the resolution of those issues." Thus, the Court defined public officials as those "who have, or appear to the public to have, substantial responsbility for or control over the conduct of governmental affairs."[131] The Court's emphasis was clearly on the power of certain people to influence public debate, not on the people themselves. As discussed above in the context of *Time, Inc. v. Firestone*, *Hutchinson v. Proxmire* and *Wolston v. Reader's Digest*, the limited public figure definition is also clearly grounded in analysis of the subject matter of the disputed statements. In one of the most articulate discussions to date of the definition of limited public figures, the District of Columbia Court of Appeals explained, "As the first step in its inquiry, the court must isolate the public controversy."[132] Again, this constitutes a clear recognition of the need for subject-matter analysis in the application of the first amendment to the law of libel. Several recent cases in which lower courts have found individuals to be involuntary public figures because of their involvement in public controversies also demonstrate the judiciary's recognition that the public's need for information about significant public issues is not dependent on the willingness of the plaintiff to project himself or herself into the public spotlight.[133]

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[126] Alexander Meiklejohn, *Security and Constitutional Rights*, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Congress, 2nd Session, 15 (1956).

[127] *Id.* at 19.

[128] Meiklejohn, *supra* note 12, at 256.

[129] *Id.* at 257.

[130] *Rosenbloom*, 403 U.S. at 43.

What of public figures then? What of the Johnny Carsons, Carol Burnetts and other prominent individuals who have thrust themselves into the public spotlight, primarily for commercial gain, and who bring libel suits because of gossip columns and tabloid exposes? All the arguments put forth by Justice Harlan in *Butts* and *Rosenbloom* and Justice Powell in *Gertz* support subjecting these people to a higher standard of fault than the truly private person whose private affairs are subject to defamatory discussion — but not on constitutional grounds. The arguments put forth by Harlan and Powell to support applying the actual malice rule to such persons were common law tort arguments — greater access to self-help mechanisms and voluntary assumption of risk. Thus, the common law, or state statutory law, should be the basis for requiring such celebrities to prove a higher level of fault than that required of private individuals defamed during discussion of private affairs. Of course, the problem with that approach is that the U.S. Supreme Court cannot dictate to the states what their statutory or common law should be. Thus, the proposal put forth in this paper — that first amendment protection be provided to discussions of matters of public concern while common law protection be afforded to discussions of celebrities not involved in the debate of public issues — could well lead to inconsistency among the states in the handling of the latter category. But the prospect of a few entertainers or sports heroes being required to prove only negligence in the publication of discussions of their love lives or behavior in restaurants seems a small price to pay for returning first amendment protection to where it belongs — debate on public issues.

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[131] 383 U.S. 75, 85.

[132] 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

[133] *See, e.g.*, Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859 (5th Cir. 1978); Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir., 1985), *cert. denied*, 476 U.S. 1141 (1986); Wiegel v. Capital Times Co., 426 N.W.2d 43 (Wis. Ct. App. 1988).

In its misleading search for content neutrality in libel law, the Supreme Court has lost sight of the fundamental constitutional function of the judiciary in libel suits: protection of the public interest in uninhibited, robust and wide-open debate on public issues. The search for content neutrality led the Court to erect a facade of focusing on the status of the plaintiff, a facade that courts continue to function behind while often finding it necessary to inquire into the subject matter of the allegedly defamatory statements. It's time for the Court to remove the facade and return again to addressing the central meaning of the first amendment.

THE DEVELOPMENT OF THE "COMMERCIAL SPEECH DOCTRINE" IN THE U.S. SUPREME COURT: BRIGHT LINE OR MUDDY WATERS?

by

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ABSTRACT

THE DEVELOPMENT OF THE "COMMERCIAL SPEECH DOCTRINE" IN THE U.S. SUPREME COURT: BRIGHT LINE OR MUDDY WATERS?

From *Valentine v. Chrestensen* (1942) to the recent *Board of Trustees of the State University of New York v. Fox* (1989), the development of a "commercial Speech doctrine" in the United States Supreme Court become a patchwork of confusing and sometimes contradictory holdings that shed little light on the types and circumstances of commercial speech that evoke the First Amendment. Over the years, the Court has established specific tests for determining Constitutional protection but the tests are usually not definitive. The four-part test enunciated in *Central Hudson Gas & Electric v. New York Public Service Commission* is an important step in the right direction but must be viewed in light of *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* (1986).

After years of progress toward broadening the rights of commercial speech, the Court in *Board of Trustees* made a significant retreat from its own earlier standards and those adopted by many lower courts. *Board of Trustees* will undoubtedly make it much more difficult for the courts to strike down a variety of governmental restrictions on commercial speech and will likely trigger a wave of new forms of state regulation to be tested in the courts..

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The Emergence of A Commercial Speech Doctrine

Introduction

The history of U.S. Supreme Court involvement in commercial speech issues is a patchwork of confusing and often contradictory decisions that strain even the most patient legal scholar's ability to discern trends and general principles. There has been no clear evolution of constitutional law on commercial speech, but instead the Court has almost erratically switched from one principle to another, dependent upon the individual facts in a particular case. The Court has established specific tests for determining whether a particular type of commercial speech has constitutional protection, but these tests have not proven definitive, as the recent case of *Board of Trustees of the State University of New York v. Fox'*[3] discussed later, illustrates.

The first major U.S. Supreme Court case on commercial speech did not emerge until 1942. Public and governmental concern with the massive anticompetitive trade practices and fraudulent marketing techniques, including false and deceptive advertising, during the start of the 20th Century was channeled into federal legislation such as the Federal Trade Commission Act of 1914, the Clayton Act of 1914 (forbidding such practices as price-fixing and corporate mergers) and the Food, Drug and Cosmetic Act of 1938 (outlawing the interstate transportation of adulterated or mislabelled food, drugs and cosmetics), rather than specific legislation regulating advertising. The prevailing belief was that commercial speech had First Amendment protection and thus could not be severely restricted.

Valentine v. Chrestensen (1942)

In 1942, however, the U.S. Supreme Court tackled head on the issue of whether commercial speech enjoys First Amendment protection. In *Valentine v. Chrestensen*,[5] the Court held that the First Amendment does not apply to "purely commercial advertising." In 1940 F.J. Chrestensen, a Florida resident, moored his submarine, formerly owned by the U.S. Navy, at a state pier in the East River near New York City. While he was distributing handbills advertising the boat, which he charged an admission fee for people to tour, the Police Commissioner of New York, Lewis J. Valentine, informed him that he was violating a state Sanitary Code that prohibited distribution of commercial and business advertising on public streets. Valentine, however, told Chrestensen that he could distribute handbills devoted solely to information or a public protest. Thus the code effectively banned advertising but not political materials.

Chrestensen was not satisfied and cleverly printed a revision of the original on one side (omitting only the admission fee). The other side had no advertising but instead criticized the City Dock Department for banning the original version of the handbill. The entrepreneur dutifully submitted the new handbill to the Police Commissioner but was rebuffed once again. No problem, he was told, with handing out the protest information, but no advertising. Chrestensen ignored the warnings, passed out the handbills and was expeditiously restrained by police. He then successfully sought an injunction in District Court for the Southern District of New York to prevent the Police from further restraining him. However, the judge granted only an interlocutory injunction against the police, pending a final decision on the constitutionality of the statute by a higher appellate court. The New York Court of Appeals (Second

Circuit), functioning as the highest appellate court in the state, upheld the district court decision.

On further appeal, though, the U.S. Supreme Court, in a 1942 decision written by Associate Justice Owen J. Roberts, unanimously reversed the lower court decree. According to the Court:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[5]

This decision, which enunciates what became known later as the "commercial speech doctrine," was gradually chipped away over the decades, but it was accepted doctrine until the 1970s. Along the way, as discussed in this paper, the Court attempted to distinguish commercial speech from noncommercial speech but created more smoke than light.

Jehovah's Witnesses Cases

During the relatively short period of March to May 1943, the Court decided four cases involving door-to-door distribution of religious materials by Jehovah's Witnesses. Many First Amendment cases decided by the U.S. Supreme Court during this century have involved this religious sect, which has always been very fervent in its attempts to proselytize, much to the chagrin of more traditional religious sects. Anyone who grew up in the rural South and Southwest during the 1950s and 60s can well recall the numerous occasions on which Witnesses would canvass the neighborhood from door-to-door seeking contributions in return for their religious tracts. The Witnesses persisted in their efforts despite many closed doors and verbal abuse from people who resented their intrusions.

Such persistence often met resistance not only from unsympathetic residents but also in the form of local ordinances and state statutes as well. *Jamison v. Texas*[6] (1943) is a prime example of the selective use of a city ordinance to restrict the activities of religious sects such as the Witnesses. Ella Jamison was convicted in a Texas court of violating a Dallas ordinance banning the distribution of handbills on public streets. She was fined $5.00 plus court costs for passing out literature about the Witnesses. Under Texas law at that time, Jamison could not appeal the decision to a higher state court and thus had to resort to appealing the case directly to the U.S. Supreme Court, which granted certiorari. In a unanimous opinion written by Justice Hugo L. Black, the Court reversed the conviction on the ground that her First and 14th Amendment rights of freedom of speech and freedom of religion had been violated. According to the Court, even though the handbills were on the face commercial, they were protected because of their religious content. The state had argued that *Valentine* should apply because the literature advertised religious books and other works, but the Court held that commercial religious materials of this type were not affected by the *Valentine* holding. "The mere presence of an advertisement of a religious work on a handbill of the sort distributed here may not subject the handbill to prohibition,"[7] the Court noted. The rationale offered by the Court for this exception to the *Valentine* rule is that the First Amendment was designed to protect this type of activity. The state simply can not be permitted to ban such distribution "merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes."[8]

On May 3, 1943, the U.S. Supreme Court issued three separate decisions, all of which dealt with "commercial" speech and involved Jehovah's Witnesses. Taken together, the majority opinions substantially define the extent to which the State can regulate religious speech within a presumably commercial context. In *Murdock v. Pennsylvania* (1943),[9] the Court reversed the convictions of eight Witnesses for violating a city (Jeannette, Pennsylvania) ordinance that permitted door-to-door sale of products only with a license, which could be obtained only upon payment of a specified fee. No exception was made in the law for religious literature. Although they were not jailed, the eight were ordered to pay fines after they were convicted for violating the ordinance by requesting contributions for religious literature they were peddling door-to-door. There was no question that they were guilty, but the defendants unsuccessfully argued before the trial court that the law violated their First Amendment rights of freedom of press, speech and religion. On appeal, the Pennsylvania Superior Court and the Pennsylvania Supreme Court upheld the convictions.

The U.S. Supreme Court, however, ruled in favor of the Witnesses in a close 5-4 decision written by Associate Justice William O. Douglas. According to the majority, the Witnesses were involved in a religious, not a commercial, venture:

> The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books ... The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed.[10]

The second decision involved a similar city ordinance being violated by a Jehovah's Witness, but the Supreme Court took a somewhat different tack in striking it down as unconstitutional. In *Martin v. City of Struthers* (1943),[11] the Court, in another 5-4 split, overturned the conviction of Thelma Martin for distributing leaflets door-to-door advertising a Jehovah's Witness service. She was fined $10 for violating a Struthers, Ohio, ordinance very similar to that in *Murdock*. There were two strange twists to this case that contrasted it with *Murdock*. First, Martin's case was initially rejected on appeal to the U.S. Supreme Court because the justices mistakenly assumed that no Constitutional issue had been raised in the lower courts, but upon a Motion for Reconsideration, the Court granted a writ of certiorari on the ground that a Constitutional question had arisen. (The Ohio Supreme Court had turned down Martin's appeal because it concluded no Constitutional issue was involved. Second, in striking down the ordinance as in violation of the First and Fourteenth Amendments, the Court also held that the ordinance infringed on not only the right of the disseminator of the information but also the right of the intended receivers, or area households, to receive the information. The Court realistically recognized the aggressiveness of sects such as the Witnesses in soliciting door-to-door. According to the Court, door-to-door solicitations can be regulated under certain conditions, but this law was too broad. The Court noted that an ordinance prohibiting solicitation of homes on which the owners had posted a sign or other notice asking not to be disturbed would be a possible way of overcoming the overbreadth of the law.

The third case, interestingly, garnered the unanimous opinion of the Supreme Court but the facts were somewhat different. In *Douglas v. City* nnette,[12] the Court declared that a Jeannette, Pennsylvania e banning the solicitation of orders for merchandise unless the individual had already obtained a license and paid a fee was unconstitutional. Two distinctions marking this case were that the soliciting was not done door-to-door and the solicitation did not involve what is known today as "point of purchase sale" (that is, soliciting for a product that is available on the spot).

Commercial Political Speech

Twenty-one years after these cases, the U.S. Supreme Court for the first time issued a major decision involving commercial "political" speech. In a the landmark *New York Times v. Sullivan* (1964),[13] the Court rejected the argument that First and Fourteenth Amendment freedoms of speech and press did not apply in the case because the allegedly libelous information appeared in a paid, commercial advertisement in the newspaper:

> The publication here was not a 'commercial advertisement in the sense in which the word was used in [Valentine v.] Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of movement whose existence and objectives are matters of the highest public interest and concern. That the [*New York*] *Times* was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[14]

The Court went on to rationalize that if it had ruled otherwise, the effect would be to discourage newspapers from publishing this type of advertising, which the Court characterized as "editorial advertisements." The Court was particularly concerned that certain groups, such as civil rights organizations in this case, that do not have ready access to the press would be prevented from disseminating their ideas to a wide audience. As the Court noted, "The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"[15]

Throughout history, political communication has consistently been granted greater First Amendment protection than almost any other form of speech other than religious communication. Thus the decision that the *New York Times* did not lose its First Amendment protection because the communication was a paid advertisement fits snugly into the Supreme Court First Amendment mold. Whether the commercial speech doctrine would apply in this case was one of the most significant aspects of the *Sullivan* decision, although the new "actual malice" rule overshadowed the "editorial advertisement" ruling. Indeed, it could be argued that *Sullivan* was the first major step taken by the Supreme Court toward eventually dismantling the commercial speech doctrine by the 1980s, even though *Sullivan* is generally not perceived as a commercial speech decision. An important question is whether the Court's reasoning on the commercial speech issue in *Sullivan* is supportable. Would struggling political groups be denied a public forum for their ideas if the press were faced with the possibility of having no First Amendment protection if it published their paid advertisements? Or, would the press still be willing to take the risk of no protection in order to obtain the advertising dollars that sustain the commercial media? No one has researched this question yet, but it is likely that if all commercial speech were treated the same for purposes of the First Amendment, even under the expanded protection commercial speech in the last two decades, there would be a "chilling" effect that could well work to the disadvantage of political and religious movements that garner little press attention and thus often resort to unconventional communication such as editorial commercials.

Until the early to mid-1970s, the U.S. Supreme Court generally avoided facing constitutional questions involving commercial speech by simply denying certiorari. But the so-called "Consumer Movement" beginning in the late 1960s and the polarization of public opinion on the issue of abortion that culminated with *Roe v. Wade*[16] in 1973 had an impact on the type of commercial speech cases reaching the Court. More specifically, the Court was faced with deciding the constitutionality of governmental restrictions on advertising that did not appear to fall neatly into either the religious or the political niche. Was such advertising *commercial speech* or was it a form of advertising that could be shielded by the First Amendment?

Sex Discrimination Advertising

In 1973 the Court had the opportunity to retreat from the commercial speech doctrine by expanding the context in which commercial speech enjoys full First Amendment protection but the justices chose instead cling to *Valentine v. Chrestensen*. The city of Pittsburgh enacted an ordinance in the late 1960s that banned sex discrimination by employers for a broad range of occupations. The *Pittsburgh Press* had long permitted employers placing help-wanted ads in the paper's classified section to list openings under "Jobs--Male Interest," "Jobs--Female Interest" and "Jobs--Male-Female." There was no doubt but that the ads effectively permitted sex discrimination by allowing employers to screen out applications from members of the "unwanted" sex, but the Court was faced with the question of whether such ads were comparable to the ad in

Valentine v. Chrestensen or the advertorial in *New York Times v. Sullivan*. Is it pure commercial speech or a hybrid that can be shielded by the First Amendment?

Pittsburgh Press v. Pittsburgh Commission on Human Relations (1973)[17] began when the Pittsburgh Commission on Human Relations, which has been granted the authority to enforce the city's antidiscrimination ordinance, charged the newspaper with violating the ordinance and, after a hearing, ordered the *Press* to comply with the law. On appeal by the paper, the Court of Common Pleas for Allegheny County affirmed the order. On further appeal, the Commonwealth Court of Pennsylvania modified the order to prohibit gender-designated classified ads only for those types of positions for which the ordinance forbade sex discrimination. Thus the newspaper was allowed to carry ads specifying gender for those occupations not covered by the law. The Pennsylvania Supreme Court declined to review the case, but the U.S. Supreme Court granted certiorari and heard oral arguments on March 20, 1973.

In a narrow 5-4 decision, the Court held that the ordinance did not violate the First and Fourteenth Amendments by banning illegal gender-specified advertising. The lineup of the justices was somewhat surprising but perhaps a harbinger of other commercial speech cases to come. Associate Justice Lewis F. Powell, Jr., wrote the 5-4 decision, and he was joined by staunch First Amendment advocates, Justices William J. Brennan, Jr., and Thurgood Marshall. The majority also included traditional conservatives, Justices Byron R. White and William H. Rehnquist. The four dissenters were Chief Justice Warren Burger and Associate Justices William O. Douglas, Harry A. Blackmun and Potter Stewart.

How could Justices such as Brennan and Marshall justify what is clearly a prior restraint on the press. According to the majority, " ... no suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press."[18] Ironically, the Court quoted liberally from *New York Times v. Sullivan* to point to the importance of the First Amendment while, nevertheless, finding that the ads resembled those of *Valentine v. Chrestensen* rather than the ad in *New York Times v. Sullivan*! The majority opinion went even further, comparing the ad to one for narcotics or prostitution:

> Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement. The illegality in this case may be less overt, but we see no difference in principle here.[19]

The majority simply did not see the state's action in this case as prior restraint even though the effect of the order was to prohibit the newspaper from publishing particular content. As Justice Stewart, joined by Justice Douglas, noted in a dissent:

> So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and the makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last. The camel's nose is in the tent.[20]

Justices Stewart and Douglas did acknowledge in the dissent that it was "within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex."[21] But he felt the government had no authority to tell a newspaper in advance what it could and could not publish.

Chief Justice Burger dissented on grounds that the decision was "a disturbing enlargement of the 'commercial speech' doctrine" and that the ruling "also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are 'sufficiently associated' with the 'commercial' parts of the papers as to be constitutionally unprotected and subject to governmental regulation."[22]

Was the court headed down a "treacherous path"? Two years later in *Bigelow v. Virginia* (1975)[23] the Court issued another decision in another commercial speech case involving the mass media. Like *Pittsburgh Press*, this case had tones of prior restraint, but the tune had a new twist. This case also illustrates how the opinions in one case can spill over into other decisions on the same topic but involving much different principles. An apparent spillover in *Pittsburgh Press*, for example, can be surmised because Justices Brennan and Marshall have consistently upheld the constitutionality of antidiscrimination laws and that the newspaper ads effectively promoted sex discrimination. In *Bigelow*, the apparent spillover was evidenced by the fact that Justices Byron R. White and William H. Rehnquist dissented both in *Roe V. Wade* (1973),[24] the controversial decision granting a woman the Constitutional right to an abortion, and in *Bigelow*, which involved newspaper ads for abortions.

Abortion Advertising: Down a Treacherous Path?

In 1971, two years before *Roe v. Wade*, abortion was illegal in Virginia, although it was permitted in some other states such as New York. Jeffrey C. Bigelow, a director and the managing editor of *The Virginia Weekly* of Charlottesville, ran an advertisement in his newspaper for a New York City abortion referral service, the Women's Pavilion. (Abortion was legal in *New York* at the time the ad appeared but became illegal later.) The newspaper ad provided considerable information about abortions in New York, including the fact that residency was not required. There was no doubt but that the ad was designed to encourage Virginia women to procure abortions in New York since it specifically mentioned that Women's Pavilion could assist a woman in obtaining "immediate placement in accredited hospitals at low cost" and that it would make all arrangements on a "strictly confidential" basis. It should be noted that the newspaper had a high circulation on the University of Virginia campus.

The statute under which Bigelow was prosecuted directly forbade anyone, including by publication, lecture or advertisement from encouraging or promoting the procurement of an abortion or miscarriage. The editor was convicted of a misdemeanor (the statute made the crime a misdemeanor only) in Albemarle County Court. He appealed to the Albemarle Circuit Court and was granted a trial de novo but convicted again. The Virginia Supreme Court affirmed the new conviction on the ground that the advertisement was purely commercial and therefore not shielded by the umbrella of the First Amendment. The U.S. Supreme Court granted *certiorari* and sent the case back to the Virginia Supreme Court for further consideration in light of *Roe v. Wade* (1973) and related abortion decisions. Once again, the state supreme court affirmed the conviction, and Bigelow filed another appeal with the U.S. Supreme Court. This time, fate was on his side.

In a resounding 7-2 decision, the U.S. Supreme Court reversed Bigelow's conviction on June 16, 1975, near the end of its 1974-75 term. The majority opinion written by Associate Justice Harry A. Blackmun and joined by Chief Justice Warren Burger and Associate Justices William O. Douglas, Thurgood Marshall, William J. Brennan, Jr., Potter Stewart and Lewis F. Powell, Jr., held that the ad did have full First Amendment protection, just as the ad in *New York Times v. Sullivan*. According to the court:

> The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. ... The advertisement ... did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'[25]

What material did the Court view as in the public interest? The Court cited the lines, "Abortions are now legal in New York. There are no residency requirements." The Court went on to note:

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience -- not only to readers possibly in need of the services offered, but also those with a general curiosity about, or genuine interest in, the subject matter of the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy.[26]

In *New York Times v. Sullivan*, the Court did not refer to the factor of newsworthiness but merely noted that the ad was not a commercial advertisement in the sense of *Chrestensen* but instead was an "editorial advertisement." How does an ad become newsworthy? Is newsworthiness alone sufficient to warrant full First Amendment protection for an ad or is it to be considered in light of other factors? Would the ad have been protected if had been nothing more than the name, address and telephone number of the Women's Pavilion under the heading "Abortion Referral"? In other words, does it enjoy constitutional protection primarily because of "newsworthy" information it conveyed? The Court left these questions unanswered, but it was apparent that the Court was headed toward expansion of First Amendment rights for a variety of forms of advertising. No matter how hard one tries, it is impossible to fully reconcile *Chrestensen* with *Bigelow* and even with *New York Times v. Sullivan*. In his dissent, Justice William H. Rehnquist (joined by Justice Byron R. White) characterized the nature of the ad as an exchange of services rather than an exchange of ideas, but the handwriting was on the wall. (Both justices also dissented in the *Roe v. Wade* abortion decision.)

The Demise of *Chrestensen*

Less than a year after *Bigelow*, *Chrestensen* began its slide toward oblivion. On May 24, 1976, the U.S. Supreme Court for the first time held that truthful commercial speech, even though purely commercial, is protected by the First Amendment. In *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council* (1976),[27] the Court ruled, 7-1, that a state statute under which licensed pharmacists could be punished for "unprofessional conduct" for advertising prescription drug prices was unconstitutional. The penalties ranged from small fines to license revocation. Interestingly, the statute was not attacked in the courts by pharmacists but instead by consumer groups who claimed "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs."[28]

The majority opinion, written by Associate Justice Harry A. Blackmun, noted, much to the surprise of many First Amendment scholars, that "in *Bigelow v. Virginia*, the notion of unprotected "commercial speech" all but passed from the scene."[29] Even a close reading of the Court's opinion in *Bigelow* gives no clear indication that such is the case. The Court in *Virginia State Board* conceded that a "fragment of hope for the continuing validity of a 'commercial speech' exception arguably may have persisted because of the subject matter of the advertisement in *Bigelow*."[30] The Court then tackled whether "there is a First Amendment exception for 'commercial speech.'" The Court made it clear that *Virginia Pharmacy Board* did not involve cultural, philosophical or political speech nor was the information newsworthy or generalized observations about commercial matters. Instead, the pharmacist, according to the Court, is attempting to communication, "I will sell you the X prescription drug at the Y price."[31] Citing *New York Times v. Sullivan*, the Court then noted that it is well established that speech does not lose its First Amendment protection simply because money is spent to purchase it. According to the justices, "Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged."[32] Thus a consumer's interest in such information could be as "keen, if not keener, than his interest in the day's most urgent political debate."[32] The majority opinion strongly criticized Virginia's contention that price advertising would adversely affect the professionalism of pharmacists and ultimately harm consumers with low quality service and presumably inferior drugs. Keeping consumers ignorant is not the solution, according to the Court, but instead individuals should be permitted to make their own choices based on information freely available in the marketplace.

Although the justices held that Virginia's statute was unconstitutional, they did note that "[s]ome forms of commercial speech regulation are surely permissible." They specifically mentioned untruthful commercial speech such as false and misleading ads and false advertising that causes actual injury. Virginia, in the Court's view, was unconstitutionally suppressing truthful speech that could contribute "to the flow of accurate and reliable information relevant to public and private decisionmaking" for the sake of preventing the dissemination of falsehoods. In other words, don't throw the baby out with the bath water. The First Amendment warrants the risk that some false information may sneak into the marketplace so that the truth may prevail.

Justice William H. Rehnquist was the sole dissenter to the Court's decision. His opinion is worthy of note, not so much for its reasoning as for the fact that it represents a strong minority view shared by some professional associations. Justice Rehnquist was particularly concerned that the Court's opinion would open the way "not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes and other products the use of which it has previously been thought desirable to discourage."[33] To illustrate his point, he satirically penned some "representative" advertisements that a pharmacist might run in the local newspaper, thanks to the decision:

> 'Pain getting you down? Insist that your physician prescribe Demoral. You pay a little more than for aspirin, but you get a lot more relief.'
>
> 'Can't shake the flu? Get a prescription for tetracycline from your doctor today.'
>
> 'Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay.'[34]

Of course, no such ads have appeared, and, in fact, the very prediction made by the majority -- a free flow of commercial information in the marketplace -- has occurred. Prescription prices have generally fallen and pharmacists are just as professional as they were before the decision. Any concern that the publication of prescription prices would somehow demean pharmacists has long since faded, but, professional organizations, as a whole -- whether they be of lawyers, physicians or other professionals -- continue to harbor fears that advertising will spell the demise of the public respect for their particular profession.

One more point in Justice Rehnquist's dissent deserves attention because it represents a vocal, minority view that smacks of elitism. According to Justice Rehnquist, "The statute ... only forbids pharmacists to publish this price information. There is no prohibition against a consumer group, such as appellees, collecting and publishing comparative price information as to various pharmacies in an area.."[35] This view ignores the reality that consumer groups would have to go to great lengths and expense to compile such information when pharmacists would be in a much better position since they have direct access. Pharmacists also have a much more effective outlet for communication -- newspaper advertising. Most consumer groups could probably not afford to place such advertising but would instead have to rely on alternative means such as pamphlets that would, in all likelihood, have very limited circulation, particularly among those groups such as the poor and the elderly who benefit the most from competition among pharmacies. This view has an aura of elitism since it assumes that consumers would not be able to effectively and efficiently discern accurate information from deceptive and misleading information.

First Amendment Protection for Commercial Speech

Did *Virginia State Board of Pharmacy* settle the issue once and for all of whether commercial speech had First Amendment protection? Just as *Roe v. Wade* spurred more questions about abortion rights, the Virginia decision left a significant number of subissues to be resolved, which the Court continues to confront more than 15 years later. Three major decisions on the issue were handed down the next year, and there have been several subsequent rulings on the average of once every two years. Many of these have dealt with advertising of professional services, although other types of commercial speech have seen the spotlight as well.

The first two of the three 1977 decisions are only summarized in this paper since they concern issues of relatively minor importance from a mass communication law perspective, but the third is discussed in detail since it deals with advertising by professionals.

In *Linmark Associates, Inc. v. Willingboro* (1977),[36] the Court held 8-0 (with Justice Rehnquist not participating) that a local ordinance banning the posting of "For Sale" and "Sold" signs on lawns violated the

First Amendment. The opinion, written by Justice Thurgood Marshall, that while the goal of the ordinance (to prevent "block busting" or white flight from neighborhoods as they are being racially integrated) may have been noble, the town had not been able to show that such a restriction was necessary nor justified under the circumstances. "If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally,'" according to the Court.[37]

In *Hugh Carey v. Population Services International* (1977),[38] a New York Education Law making it illegal for anyone to sell or distribute nonprescription contraceptives to minors under age 16 and for anyone to advertise or publicly display such contraceptives was declared unconstitutional by a divided court. Population Services International owned Population Planning Associates, a North Carolina corporation that advertised and sold contraceptives, without age restrictions, via mail order throughout the country, including in New York. (The ads appeared in New York magazines and newspapers.) In applying a "strict scrutiny" test to the statute because of an earlier decision by another divided court that appeared to recognize a limited constitutional right to privacy,[39] Justice William J. Brennan, Jr., writing for the majority, held that the prohibition of distribution of contraceptives violated the due process clause of the 14th Amendment, but the justices could not agree whether such a ban for minors under the age of 16 would be permissible. Further, the Court held that the advertising restrictions violated the First Amendment, although the majority could not agree on whether such restrictions are inherently unconstitutional.

Professional Ads: Lawyers

Certainly, the most important decision regarding commercial speech in 1977 was *Bates v. State Bar of Arizona,*[40] the first of a series of cases involving lawyer advertising. In a split 5-4 decision written by Justice Harry A. Blackmun, the Court effectively broadened *Virginia Board of Pharmacy* to include the same type of advertising (*i.e.*, prices) for lawyers. Attorney John R. Bates and his partner, Van O'Steen, started a legal services clinic in Phoenix that made extensive use of paralegals, standardized forms and other cost-cutting measures. In 1976, two years after they established the clinic that was designed to handle primarily routine services for lower income clients, the lawyers defied a state bar regulation that forbade advertising by placing an ad in the *Arizona Republican* that simply listed the services their firm offered and typical fees. The ad basically touted the availability of "routine services" for "very reasonable fees." No other claims were made.

At that time, Arizona, like most states, had strict regulations regulations regarding advertising by certain professionals such as physicians and lawyers. These regulations were either in the form of Codes of Conduct that were enforced by the state licensing arm such as the medical board of the state bar association or of state statutes. The rationale, at least on the surface, for such regulations was that they would prevent deceptive and misleading advertising by these groups and that advertising demeans the profession. As Justice Rehnquist noted earlier in his dissent in *Virginia Board of Pharmacy*:

> It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment.[41]

Although the Court ruled that the Arizona regulation was an unconstitutional infringement on freedom of speech and freedom of the press, the Justices had a more difficult time dealing with this case than with the earlier pharmacy decision. As attorneys themselves, the Justices no doubt were concerned that a ruling that was too broad in granting lawyers the right to advertise could open a Pandora's Box that might ultimately undermine the standards and traditions of the profession. The close 5-4 vote certainly reflects that concern, as does the majority opinion itself. As Justice Blackmun indicated in the holding:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained ...[42]

The Court not only made it clear that this holding was applicable only to the specific type of advertising involved, but it also went to unusual lengths to distinguish permissible v. impermissible forms of advertising. While lawyers may advertise prices for such routine services as simple wills, uncontested bankruptcies, uncontested divorces and adoptions, the Court noted, advertising for more complex services such as contested divorces and estate settlements may be subject to regulation. The Court also indicated, as it had in earlier decisions, that false, deceptive and misleading advertising can be restrained. But the majority opinion noted that advertising claims as to the quality of services and in-person solicitations might be justifiably suppressed or limited. The Court also mentioned a possible requirement that a warning or disclaimer be made in certain kinds of advertising. As might be expected, the Justices made no judgment as to whether such restraints would be upheld since the case at hand did not involve any of this type of advertising:

> In sum, we recognize that many of the problems in defining the boundary between the deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and smoothly.[43]

Could the Court have broadened the decision to include advertising by other professionals? Over the decades, the Supreme Court has enunciated an overbreadth doctrine on First Amendment issues, which essentially permits individuals challenging a statute on First Amendment grounds to demonstrate that the statute could be applied unconstitutionally in circumstances beyond those at issue in the case. This doctrine flies in the face of the traditional rule in constitutional cases that a statute can be challenged only in relation to the conduct or circumstances at hand. However, in First Amendment cases the Court permits a broader challenge because "an overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute."[44] Thus the justices could clearly have broadened the decision to include advertising by other professionals such as physicians and dentists, but the Court chose not to do so in *Bates* because "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context."[45] According to the majority opinion, advertising is unlikely to be affected by a chilling effect since it is "linked to commercial well-being."

In spite of the 5-4 vote, *Bates* is definitely a broadening of the principles laid down in *Virginia Board of Pharmacy*, but this extension of First Amendment protection to include advertising of routine legal services (*Virginia Board of Pharmacy* dealt only with advertising of prescription drug *prices*, not the availability of services) was not wide enough to put truthful advertising on par with other forms of speech. Beginning with *Bigelow*, the Court deliberately chose to follow the circuitous route of a case-by-case analysis rather than applying the overbreadth doctrine that would have protected truthful commercial speech to the same extent as political and religious speech. *Bates* raised far more questions than it answered, and many of those questions have yet to be resolved, although some of them were tackled in subsequent cases.

The dissenters included Chief Justice Warren Burger and Associate Justices Lewis F. Powell, Jr., Potter Stewart and William H. Rehnquist. Their basic argument was that the ruling was, as Justice Powell stated, "an invitation -- by the public-spirited and the selfish lawyers alike -- to engage in competitive advertising on an escalating basis."[46] Justice Rehnquist went even further in his dissent. While Justice Powell indicated in his dissent that some forms of legal advertising might have First Amendment protection, Justice Rehnquist clung to *Valentine v. Chrestensen:* "The *Valentine* distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the slippery slope away from it."[47] As subsequent decisions demonstrate, Justice Rehnquist continues to hold that minority view even while serving as the Chief Justice, a role that has forced him to seek more consensus among the justices in forging more definite rulings.

Within a year after *Bates*, the Court began a series of decisions that set out the specific parameters of First Amendment protection for commercial speech of attorneys. In *Ohralik v. Ohio State Bar Association* (1978) and *In Re Primus* (1978),[48] the U.S. Supreme Court ruled on the extent to which states may regulate attorneys' solicitation of potential clients. In *Ohralik* the Court upheld the suspension of an attorney by the Ohio Bar Association for his in-person solicitation of two 18-year-old women shortly after they been been in a car accident. The lawyer's efforts resulted in both victims signing contingent fee agreements with the attorney. The state bar association suspended Ohralik even though it was never able to demonstrate any harm to the women from the agreements. In his majority opinion, Justice Lewis F. Powell, Jr., distinguished this type of personal solicitation from the advertising in *Bates*. Ohio had a "legitimate and indeed 'compelling'" interest in "preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,'" according to Justice Powell.

In the second case, *In Re Primus*, a South Carolina volunteer American Civil Liberties Union attorney sent a letter to a former patient of a physician to solicit her interest as a potential plaintiff in a suit against the doctor whom the lawyer believed had sterilized pregnant women who were allegedly told that they would no longer receive Medicaid care unless they agreed to the surgery. Justice Powell, again writing for the majority, set aside the public reprimand handed down to the ACLU attorney on grounds that the First Amendment right to freedom of speech protected this form of political expression since there there was no demonstration of "undue influence, overreaching, misrepresentation, or invasion of privacy."[49] In other words, the Court viewed Primus' actions as political, not commercial, expression, while Ohralik was engaging in a commercial transaction. Some scholars would characterize such a distinction as splitting hairs, but the Court saw a clear difference. Justice Rehnquist, as expected, dissented in *Primus* since he saw "no principled distinction" between the two cases in which "'ambulance-chasers' suffer one fate and 'civil liberties lawyers' another ... I believe that constitutional inquiry must focus on the character of the conduct which the State seeks to regulate, and not on the motives of the individual lawyers or the nature of the particular litigation involved."[50]

First Amendment Rights of Nonmedia Corporations

Another 1978 Supreme Court decision on commercial speech went relatively unnoticed, probably because the case involved the First Amendment rights of nonmedia corporations. In *First National Bank of Boston v. Bellotti* (1978),[51] the Court struck down as unconstitutional a Massachusetts statute that banned banks and other businesses from attempting to exert direct influence on public opinion unless the issue involved directly and materially affected its business, property or other assets. (The bank had tried to get voters to reject a proposed constitutional amendment granting the legislature the authority to enact a progressive (*i.e.* graduated) personal income tax.) In striking down the statute, the Court for the first time held that nonmedia corporations have at least some First Amendment rights.

Just as the Court has been reluctant to grant full First Amendment rights to commercial speech of attorneys, it has also hesitated to broaden the constitutional protection for commercial speech of other professionals. Thus in 1979 in *Friedman v. Rogers*,[52] the justices held 7-2 that Texas could prevent optometrists from practicing under a trade name since the State had a "substantial and well-demonstrated" interest in protecting consumers from the deceptive and misleading use of optometrical trade names.

The Emergence a Modern Commercial SpeechDoctrine

Central Hudson Gas & Electric v. PSC (1980)

One year after *Friedman*, the Supreme Court handed down two decisions on the same day dealing with commercial speech rights of public utilities. (During the mid to late 1970s, many public utilities began speaking out on controversial issues such as nuclear energy and environmental regulations and discussing their views in "inserts" sent with the monthly bills.) Both *Consolidated Edison Co. v. Public Service Commission of New York* (1978)[53] and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980)[54] involved attempts by a state regulatory agency (in fact, the very same agency) to bar a utility from engaging in particular types of commercial speech. The content of the speech differed significantly between the two, but the First Amendment issues were quite similar.

In 1977, the New York Public Service Commission issued an order barring all public utilities from "using bill inserts to discuss political matters, including the desirability of future development of nuclear power." The order was sparked by a complaint filed by the Natural Resources Defense Council, a consumer group opposed to nuclear power, after Consolidated Edison included an item entitled "Independence Is Still a Goal, and Nuclear Power Is Needed to Win the Battle" in its January 1976 monthly insert. The item specifically touted the benefits of nuclear energy and noted that the benefits significantly outweighed any risks and that this form of energy was economical, clean and safe. NRDC had asked the electric utility to include a rebuttal written by NRDC in the next month's insert. When Con Ed refused, NRDC filed a complaint with the Commission and requested that the Commission order Con Ed to offer space in the monthly inserts to organizations and individuals holding views opposed to those expressed by the utility on public controversies. Instead of granting NRDC's request, the Commission adopted a policy of prohibiting public utilities from discussing any issues of public controversy. Although the ban was obviously aimed at the topic of nuclear energy, it nevertheless imposed prior restraint on all public controversies.

Consolidated Edison challenged the order in court. The New York Supreme Court, Special Term, held that the order was an unconstitutional prior restraint, but the appellate division of the state Supreme Court reversed and the New York Court of Appeals, the highest appellate court in the state, affirmed. The state Court of Appeals held that the order was a reasonable time, place and manner restriction that was designed to protect a legitimate state interest -- individual privacy (essentially the right not to be bombarded with utility propaganda. In a 7-2 decision written by Associate Justice Lewis F. Powell, Jr., the U.S. Supreme Court reversed the New York Court of Appeals. According to the Court, the ban was *not* "(i) a reasonable time, place and manner restriction, (ii) a permissible subject-matter regulation, or a narrowly tailored means of serving a compelling state interest."[55] The majority opinion specifically noted that "a constitutionally permissible time, place and manner restriction may not be based upon either the content or subject matter of the speech." This is a reiteration of a well-established principle that such prior restraint must be *content neutral*.

What about the consumer's right of privacy to not be exposed to such controversies when he/she opens the monthly utility bill? The Court strongly rejected this rationale and a number of other justifications the state had offered in its defense for imposing the ban. According to the Court:

> Passengers on public transportation or residents of a neighborhood disturbed by the raucous broadcasts from a passing soundtruck may well be unable to escape an unwanted message. But customers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes' ... The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.[56]

The Court also rejected the argument that the Court's decision in in 1969 in *Red Lion Broadcasting v. Federal Communications Commission,*[57] upholding the Fairness Doctrine justified the ban, noting that the airwaves are a limited public resource while billing inserts are not. Even the argument that the ban would prevent consumers from subsidizing the expense of the utility's airing of its controversial views was rejected. According to the Court stated, there was nothing to indicate that the regulatory agency "could not exclude the cost of these bill inserts from the utility's rate base."[58]

Four-part Test

In *Central Hudson Gas & Electric v. Public Service Commission of New York* (1980),[59] the U.S. Supreme Court for the first time articulated a four-part analysis for determining whether a particular restriction on commercial speech is constitutional. In 1973, the United States suffered an "energy crisis" brought on by an Arab oil embargo imposed by the Arab oil cartel known as OPEC (Organization of Petroleum Exporting Countries) in October in retaliation for American support of Israel during the Arab-Israeli War. The ban was lifted on March 18, 1974, after rather severe fuel shortages in this country. The federal government and most states adopted stringent energy conservation measures and launched a public relations effort to encourage Americans to adopt their own conservation methods.

During the energy crisis the New York Public Service Commission ordered the electric utilities in the state, including Central Hudson, not to advertise nor promote the use of electricity. The electric companies dutifully complied with the order during the national energy crisis, but after the embargo was lifted in early 1974 and the effects of the shortage began to wear off, some public utilities slowly reverted to their traditional promotional advertising. In 1977 the New York PSC adopted a policy statement that continued its ban on promotional advertising even though the energy crisis had abated. The statement did not ban all advertising, only "promotional advertising," which the commission defined as that designed to promote the purchase of utility service. Institutional and informational advertising that was not aimed at increasing sales was not prohibited.

Central Hudson Gas & Electric challenged the ban on First and 14th Amendment grounds in court but the state trial court, intermediate appellate court and the New York Court of Appeals all held that the order was constitutional. However, in an 8-1 opinion written by Justice Lewis F. Powell, Jr., the U.S. Supreme Court ruled that the ban was unconstitutional. Although there were three separate concurring opinions, only Justice William H. Rehnquist dissented. According to Justice Powell:

> ... our decisions have recognized "the 'commonsense' distinction speech proposing a commercial transaction, [and] other varieties of speech" [citing an earlier decision]. The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.
>
> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it ... or commercial speech related to illegal activity.[60]

The opinion went on to formulate a four-part analysis for courts to apply in commercial speech cases:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is more extensive than necessary to serve that interest.[61]

The Court then applied the analysis to the *Central Hudson* case and determined that the ban did indeed violate the First Amendment. The Court made several interesting points in its analysis. First, the opinion noted that unless there are extraordinary conditions, a monopoly position such as control over the supply of electricity in this case does *not* change the First Amendment protection accorded the business. Second, although the state's interest in imposing the ban (conserving energy and ensuring fair and efficient rates) was substantial, any negative impact of promotional advertising was "highly speculative." Finally, the Court contended that the State had not demonstrated that its goal of promoting energy conservation could not be accomplished by a less restrictive means than a total ban on promotional advertising.

As with any judicial analysis, the four-step *Central Hudson* test is probably not as clear and concise as some lower courts would prefer, but it has proven viable in subsequent commercial speech cases, as you will see. The Court had effectively applied the test, or at least its basic premises, in more recent decisions leading up to *Central Hudson*, but this was the first time the justices had articulated a specific, step-by-step analysis. Not all of the justices agreed with the test. Indeed, Associate Justice Harry A. Blackmun, joined by Justice William J. Brennan, Jr., indicated in a concurring opinion that the test "is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech."[62] According to Justice Blackmun, "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public."[63] Thus Justice Blackmun would extend the commercial speech doctrine to include a much broader range of expression than the

Central Hudson formula. Justice John Paul Stevens, joined also by Justice Brennan, did not view *Central Hudson* as a commercial speech case at all since, as he saw it, the breadth of the ban exceeded the boundaries of the commercial speech concept: "This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions."[64]

Finally, Justice Rehnquist, as would be expected based on his previous dissents in commercial speech cases, believed the state's ban was constitutional as a "permissible state regulation of an economic activity." He once again noted that "the Court unleashed a Pandora's box when it 'elevated' commercial speech to the level of traditional political speech by according it First Amendment protection."[65]

Was the promotional advertising a form of political speech under the circumstances in *Central Hudson*? What if the utility had taken a direct stand against the PSC ban in its advertising? What if the company had indirectly promoted electric use by advertising new fuel-efficient appliances? Under Justice Rehnquist's analysis, could the commission have banned all utility company advertising, including "institutional and informational"?

A Trickle of Cases Since *Central Hudson* But More Muddy Waters

Since *Central Hudson* the U.S. Supreme Court has reviewed relatively few commercial speech cases, although two more recent cases -- one in 1988 and another in 1989 -- have muddied the waters again on First Amendment protection for commercial speech. Three of the seven major Court decisions in this area since *Central Hudson* have concerned advertising by professionals.

More Professional Advertising

Two years after *Central Hudson*, the Supreme Court ruled that a state may not restrict lawyer advertising to specific types of information. After the *Bates v. State Bar of Arizona* decision in 1977, the Missouri bar adopted some new rules of professional ethics that were believed to be permitted under the principles established in *Bates*. It should be noted that most state bar associations, which traditionally determine the professional standards for attorneys in the state, have taken a rather conservative approach to advertising. Lawyers, in general, disapprove of most forms of promotion and advertising, and when a state or appellant court approves restrictions on advertising imposed by the bar association in one state, the bar associations in other states usually move quickly to adopt those tougher standards if they do not already have them. Lawyers are not the only professionals, of course, who abhor advertising. The same sentiment against professional advertising appears to prevail among physicians, pharmacists, nurses, accountants, etc.

The Missouri restrictions were rather severe, as the U.S. Supreme Court noted In the Matter of R_____ M. J______ (1982),[68] in which the justices unanimously struck down a series of rules of professional ethics. "RMJ" was reprimanded for violating several of the rules, including restrictions on information about areas of practice, on announcements about office openings and on jurisdictions in which he was admitted to practice. The rules were so strict that only 23 specific terms could be used to describe areas of practice. "RMJ," for example, was reprimanded for using "real estate" instead of "property" in his ad and for listing "contracts" and "securities" as areas of practice. He also ran afoul of the rules by mailing out cards announcing the opening of his office to individuals who were not included in the categories to whom such information could be sent. "RMJ" was also cited for accurately advertising that he was a member of the Missouri and Illinois bars and that he had been admitted to practice before the U.S. Supreme Court.

The majority opinion, written by Associate Justice Lewis F. Powell, Jr., pointed out that the Missouri bar made no assertions that the ads were in any way misleading nor inaccurate and thus had demonstrated no substantial state interest in enacting the regulations. Indeed, about all the state had been able to show was that the ads may have approached being in bad taste. Although the Court held that all of the restrictions being challenged were unconstitutional, Justice Powell indicated that the line in the ad in large boldface type proclaiming that "RMJ" was a member of the U.S. Supreme Court bar may have been somewhat misleading and in bad taste. Rule 5 of the *Rules of the Supreme Court of the United States* allows admission to practice before the court if the attorney has been admitted to practice in the highest court of a state, territory, district, commonwealth or possession for a minimum of three years and that he or she "appears to the Court to be of good moral and professional character. After an application be filed and an admission fee is paid, the attorney is then sworn in. Thus the vast majority of attorneys are eligible to be a member of the Supreme Court bar. Nevertheless, the Court noted there was nothing in the record to indicate that even this information was actually misleading, although "this relatively uninformative fact ... could be misleading to the general public unfamiliar with the requirements of admission to the bar" of the Supreme Court.

The Court found that the other violations, including the mailing of announcement cards to a larger audience than that permitted under the rules[67] and the listing of other jurisdictions to which "RMJ" had been admitted, were also not misleading and thus protected by the First Amendment.

The unanimous opinion in this case is not surprising in light of previous Court decisions, including *Bates*. Note that the rules in this case were very restrictive. Although the rationale of bar associations for imposing such regulations is ostensibly to preserve the public respect for and dignity of the profession, one usual effect is to reduce competition among attorneys and thereby prevent legal fees from declining. No mention of such effects was made in the Court's decision, but consumer groups traditionally argue that advertising by professionals improves the marketplace for the consumer by increasing competition.

In the same year as *In the Matter of R ____ M. J ____*, the Court affirmed an opinion by the U.S. Court of Appeals for the Second Circuit[68] that upheld orders by the Federal Trade Commission forbidding the American Medical Association and the American Medical Association from imposing total bans on advertising by members of their respective associations. In *American Medical Association v. Federal Trade Commission* (1982),[69] the Supreme Court upheld the appellate court decision without opinion. Thus we do not know specifically why the Court upheld the decision, although the rules did indeed bar truthful advertising by physicians and dentists. The FTC rules, by the way, appear to be in line with *Bates* since they permitted the regulation of deceptive and misleading advertising.

Contraceptive Ads

During its next term, the U.S. Supreme Court faced what might initially appear to be a question with a complex answer: Is there a First Amendment right to mail *unsolicited* advertising for contraceptives? The answer provided by the Court in *Bolger v. Youngs Drug Products Corp.* (1983)[70] turned out to be rather simple: yes. Arriving at the answer was not a simple process, however. Based on the long line of cases discussed thus far in this paper, it is clear that noncommercial unsolicited mailings have full First Amendment protection. Unsolicited commercial mail would also appear to have some First Amendment protection, thanks to *Bates* and *Central Hudson Gas & Electric*.

Youngs Drug Products, one of the largest manufacturers of condoms, regularly planned to send unsolicited advertising matter through the U.S. mail, including a drug store flyer and two pamphlets entitled "Condoms and Human Sexuality" and "Plain Talk about Venereal Disease." Upon hearing the company's plan, the U.S. Postal Service notified the company that such mailings would violate a federal statute that provided "any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter."[72] The USPS rejected Youngs' contention that the law was a violation of the First Amendment. When the manufacturer sought declaratory and injunctive relief from the USPS decision in U.S. District Court for the District of Columbia, the court granted the injunction and declared the statute unconstitutional. The Postal Service appealed, but the the U.S. Supreme Court upheld the lower court ruling.

The threshold question was whether this type of speech was commercial or noncommercial. Surprisingly, the Court opted for the former even though the pamphlets, at least, were highly informational. (One of the pamphlets made numerous references to condoms made by Youngs, while the other focused more on generic terms.) Justice Thurgood Marshall wrote the majority opinion that agreed with the District Court that even the informational pamphlets constituted commercial speech:

> ... Most of appellee's mailings fall within the core notion of commercial speech -- 'speech which does "no more than propose a commercial transaction."' [citing *Virginia Pharmacy*] Youngs' informational pamphlets, however, cannot be characterized merely as proposals to engage in commercial transactions. Their proper classification as commercial or non-commercial speech thus presents a closer question. The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. [citing *New York Times v. Sullivan*]. Similarly the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn these materials into commercial speech. [citing *Bigelow*].
>
> The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech.[72]

Finding that the proposed mailings were commercial speech, the Court then appropriately applied the *Central Hudson* four-part test for determining whether the specific governmental restrictions on this commercial speech were constitutional. Although the government in this case was federal rather than state, as it had been in earlier cases , the four-part test is still the same. First, the Supreme Court determined that the advertising was not misleading and was not concerned with illegal activities and that it promoted "substantial individual and societal interests" such as family planning and the prevention of venereal disease. The USPS had claimed the substantial government interest was in preventing interference with parents' attempts to discuss birth control matters with their children, but the majority reasoned that the particular statute lent "only the most incremental support for the interest asserted. We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailbox."[73]

The Court then went on to conclude that the statute was overly broad in achieving its objective. Noting that the unsolicited mailings were "entirely suitable for adults," Justice Marshall's opinion evoked an interesting analogy: The "level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox."[74] This same reasoning has been applied in other contexts, including obscenity when the argument is made that sexually explicit materials could accidentally fall into the hands of children.

Justice William H. Rehnquist (joined by Justice Sandra Day O'Connor) filed a separate but concurring opinion that foresaw the governmental interest as substantial, but Justice Rehnquist agreed with the majority that the statute was much too broad in light of the limited intrusion involved. Justice John Paul Stevens also filed a separate, concurring opinion in which he argued, "The statute ... censors ideas, not style. It prohibits appellee from mailing any unsolicited advertisement of contraceptives, no matter how intrusive and tactful; yet it permits anyone to mail unsolicited advertisements of devices intended to facilitate conception, no matter how coarse or grotesque."[75]

The *Youngs Drug Products* decision is particularly apt as we head toward a new century and the number of individuals with the Acquired Immune Deficiency Syndrome (AIDS) complex continues to escalate toward a worldwide epidemic. Who would have predicted in 1983 that (1) the U.S. Surgeon General would six years later attempt to mail unsolicited to every household in the United States an information booklet on the disease, complete with prevention tips (2) by the end of the decade radio and television public service announcements would appear regularly to warn of the dangers of "unsafe sex" in spreading AIDS and tout condoms as a means of preventing AIDS, and (3) some radio and television stations would eventually accept paid advertising for condoms, without even a whimper from the Federal Communications Commission? All three of the major commercial networks -- ABC, CBS and NBC -- have continued to reject brand-name commercials for condoms, although they regularly air the free public service announcements.[76] But some over-the-air and cable TV stations have broadcast brand-name commercials, including two "whimsical" ones by condom manufacturer, Ansell-Americas. In the first, the Phantom of the Opera, complete with mask and cape, is told by a clerk in a drugstore that he does not need to wear a mask when purchasing condoms. In the second, Robin Hood asks the clerk for Lifestyle condoms for his Merry Men and is told, "You buy the same brand as the Sheriff of Nottingham."[77]

Unlike most professionals such as physicians and pharmacists, lawyers have continued to test the First Amendment limits of advertising. Two cases in the last decade particularly stand out because lawyers in both went considerably beyond the guidelines or rules established by their bar associations and yet found constitutional protection in the U.S. Supreme Court. In the first case, *Zauderer v. Office of Disciplinary Counsel* (1985),[78] a Columbus, Ohio, attorney named Philip Q. Zauderer violated the Ohio Disciplinary Rules governing attorneys when he ran a newspaper advertisement that indicated he was willing to handle cases on a contingent fee basis involving women who had been injured by an intra-uterine contraceptive device known as the Dalkon Shield. The ad included an illustration of the device and claimed that no fees would be owed by the client" unless she won damages. Both the illustration and the "no fees" assertion were in clear violation of the Ohio rules. The top part of the ad in bold type with all capital letters said: "DID YOU USE THIS IUD?" Along the side was the line-drawing of the Dalkon shield. The ad also noted, "Our law firm is presently representing women on such cases."

Zauderer was disciplined by the Ohio Office of Disciplinary Counsel for the advertising on the grounds that he was soliciting business, had engaged in deceptive advertising and had included a drawing in the ad. The Ohio Supreme Court upheld the state's disciplinary action, but the U.S. Supreme Court in a 5-3 decision held that the Ohio rule regarding solicitation was a violation of the First Amendment. The majority opinion, written by Justice Byron R. White, said the rule was overly broad since it applied to all forms of such advertising -- deceptive and nondeceptive. According to the Court:

> Were we to accept the State's argument in this case [that such solicitations are inherently misleading and therefore subject to the ban], we would have little basis for preventing the Government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising.[79]

All eight of the justices voting found that the ban on illustrations was unconstitutional, although six of them agreed that Zauderer could be disciplined for his claim that "no fees would be owed by the client" because he failed to disclose that the client could be held responsible for court costs. (While most states permit attorneys to represent clients at no charge and indeed encourage them to act *pro bono* for indigent individuals, courts and state codes of professional conduct generally do not permit attorneys to pay court costs for clients, although courts usually have the discretion of waiving such costs when warranted.) Ohio rules required full disclosure of information regarding contingency fees, and this was constitutionally sound, according to the U.S. Supreme Court.

Zauderer basically stands for the principle that attorneys and, presumably, other professionals can engage in traditional forms of advertising and promotion so long as such commercial speech is neither misleading nor deceptive. The next case, the most recent one involving lawyer advertising, sent shock waves through some legal circles because it appears to have opened the door to a wide variety of advertising. The decision is particularly significant because it answered a major question that remained after *Ohralik, Bates* and *Zauderer*: Do attorneys have a First Amendment right to solicit clients via direct mail?

A Kentucky attorney, Richard D. Shapero, requested the Attorneys Advertising Commission, a three-member body created by the Kentucky Supreme Court "to aid lawyers to ethically advertise and to protect the public,"[80] to approve a letter he wished to send to potential clients believed to be facing foreclosure on their home mortgages. The proposed letter urged the recipient to "call my office ... for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you" [capital letters in the original]. Under the Kentucky Rules of the Supreme Court at that time, attorneys were banned from sending letters or advertisements to potential clients who might need legal assistance because of a change of circumstances such as a divorce, death in the family or foreclosure. Thus the Commission rejected Shapero's letter as a direct solicitation in violation of the state supreme court rules. Shapero appealed the decision to state Supreme Court, which ruled against him, but the U.S. Supreme Court ruled 6-3 in Shapero v. Kentucky[81] that the Kentucky rule was a violation of the First and 14th Amendments because it imposed a blanket ban on both deceptive and nondeceptive advertising through the mail. The state had argued that the prohibition was necessary to prevent lawyers from exerting undue influence or abusing individuals by taking advantage of potential clients facing serious legal problems. The majority opinion, written by Justice William H. Brennan, Jr., contended, as the Court did in *Youngs Drug Products*, that the potential for undue influence and fraud was significantly less than that of in-person solicitation, which the Court had held in *Ohralik* could be barred. The "File 13" proposition comes into play once again: if you don't like what you receive in the mail, throw it in the trash. Or, as Justice Brennan said, "Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the reader of an advertisement can effectively avoid further bombardment of his sensibilities simply by averting his eyes."[82]

Shapero has continued to attract controversy. In 1989 he became the host of a 6-7 p.m., weekly call-in show on a Louisville, Ky., AM radio station. "Shapero at Law" has been criticized by the *Louisville Courier-Journal* for allegedly airing inaccurate information, but the president-elect of the Kentucky Bar Association and the Chief Justice of the Kentucky Supreme Court refused to criticize Shapero's show even though the KBA and the Court have both been targets of the colorful lawyer's comments.[83]

At the time of the *Shapero* decision, about half of the states permitted solicitation by mail. Now such attorney advertising, so long as it is not deceptive nor misleading, is permitted in all states. The Kentucky Supreme Court, for example, revised its rules to delete this type of advertising as a violation, but still prohibits advertising that "[c]ontains a misrepresentation of fact or law ... [i]s likely to create an unjustified expectation about results the attorney can achieve ... [c]ompares the attorney's services with another attorney's services, unless the comparison can be factually substantiated ..."[84] Most states, like Kentucky, permit attorneys to include a variety of types on information in an advertisement including fields of practice (with the disclaimer: "This is an advertisement. Kentucky law does not certify specialities of legal practice."), membership and offices in legal fraternities and legal societies, foreign language ability, names and addresses of bank references and contingent fee and hourly rates.[85]

Many attorneys, judges and bar associations continue to oppose most forms of lawyer advertising, but anyone who regularly watches commercial television has no doubt noticed a proliferation of attorney ads, many of which are as crass and bold as those for new and used cars. Even the conservative American Bar Association, which for a long time opposed most forms of lawyer advertising, has relented. It should be noted that the particular rule struck down in *Shapero* had been adopted by Kentucky from the ABA's Model Rules of Professional Conduct. (Most state bar associations have adopted these rules, usually with revisions, for their own attorneys.) Even the *ABA Journal* frequently carries articles on topics such as successful marketing, including appropriate advertising techniques, "Hawking Legal Services" and "Improving Your Firm's

Profitability." The ABA Model Rules of Professional Conduct now permit many forms of advertising, including direct mail solicitations of the type challenged in *Shapero*.

While the amount attorneys spend on advertising has continued to climb during the years since *Bates*, some states such as Texas still cling to rather stringent rules on ads. In 1988, the year *Shapero* was decided, the State Bar of Texas permitted an attorney to advertise only the law firm's address, the range of legal services offered and prices.[86] According to a publication of the Yellow Pages Publishers Association, one Texas law firm was cited by the State Bar of Texas for violating its rules when it failed to mention the specific names of lawyers responsible for the areas of specialization cited in a Yellow Pages ad. The same publication notes, on the other hand, that a Florida attorney was apparently not in violation of that state's bar association rules (a version of the ABA Rules of professional Conduct) when his quarter-page spread in the local Yellow Pages proclaimed: "NATIONALLY KNOWN ATTORNEY WITH GUEST APPEARANCES ON GOOD MORNING AMERICA, GERALDO, ALAN BURKE & OTHER SHOWS."[87]

According to the *ABA Journal* polls, by 1987 one-third of all lawyers advertised in some form in 1987, compared to only 24 percent two years earlier.[88] No doubt, the percentage is substantially higher today, probably approaching the one-half mark Obviously, most advertising is in the form a simple ad in the local newspaper or Yellow Pages, but there are the Joel Hyatts (Hyatt Legal Services) of the world who spend considerable sums on television and radio commercials to make themselves salient to large audiences of potential clients. Edward Burke, vice president of the management consulting firm of Hildebrandt Inc., recommends that law firms that market their services spend one to three percent of their gross revenues for marketing.[89]

In spite of Shapero, many prominent jurists such as former U.S. Supreme Court Justice Lewis F. Powell, Jr., current Justice Sandra Day O'Connor and Chief Justice William H. Rehnquist continue to oppose most types of lawyer advertising. One of the most articulate advocates of greater restraint in lawyer ads is former Iowa Supreme Court Chief Justice W. Ward Reynoldson, who contends that "marketplace lawyer advertising, using all the sights, color, sounds, subliminal messages and not-so-hidden persuaders of commercial television, adversely affects not only the public's perception of those court officers [lawyers], but also of the courts and the judicial system."[90]

Lawyers continue to test the bounds of their First Amendment rights and more cases involving attorney advertising will undoubtedly reach the U.S. Supreme Court for years to come, as answers are sought to the many questions still lingering after *Shapero*. Are testimonials by satisfied clients permissible in ads? Can a state bar association require that a lawyer include his or her name and address in all advertising? (The Appellate Division of the New York Supreme Court held in 1988 that such a restriction is not a violation of the First Amendment.[91]) Can the use of dramatic music, catchy slogans, premium offers, slapstick routines or unusual backgrounds be prohibited?

Posadas: A Retreat or a Quirk?

A 5-4 decision in 1986, written by Justice William H. Rehnquist, struck what some legal scholars believe to be a serious blow to the idea that truthful commercial speech concerned with a legal product or service has First Amendment protection. In *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* (1986),[92] the Court applied the four-part *Central Hudson* test for commercial speech to find that a government's restrictions on advertising for legal gambling were not in violation of the First Amendment. While the Court had indicated since *Bigelow v. Virginia* in 1975 and up through *Bolger v. Youngs Drug Products* in 1983 that advertising for legal products and services that was not misleading nor deceptive had constitutional protection, *Posadas* appears to have squelched much of the progress made in those cases toward putting commercial speech on an equal constitutional footing with noncommercial communication. No matter how much one scrutinizes the reasoning in *Posadas*, it is difficult to square it with the three B's -- *Bigelow*, *Bates* and *Bolger*.

In 1948 the Puerto Rican government legalized most types of casino gambling in an effort to beef up its tourism industry. The effort paid off as tourists flocked to the Commonwealth. The 1948 legislation also banned all advertising by casinos to the residents of Puerto Rico, although such advertising was permitted to be directed at the tourists within the Commonwealth and in the continental United States. (Puerto Rican citizens were allowed to use the casinos.) A governmental agency, known as the Tourism Company of Puerto Rico, was granted the authority to administer the statute, including the advertising provisions. The Condado Holiday Inn, which was owned by Posadas de Puerto Rico Associates, defied the ban on advertising directed to Puerto Ricans and was fined on several occasions for doing so. The hotel consequently filed suit against the government agency, asking for a declaratory judgment that the advertising prohibition was unconstitutional. After traveling through the Puerto Rican judicial system, including a dismissal by the Puerto Rican Supreme Court for lack of a substantive constitutional issue, the U.S. Supreme Court agreed to hear the appeal. On the threshold question of whether the particular speech in question was commercial or noncommercial, the Court determined that the case involved "the restriction of pure commercial speech which does no more than propose a commercial transaction." The Court thus applied the *Central Hudson* analysis to find (1) the restriction "concerns a lawful activity and is not misleading or fraudulent, at least in the abstract," (2) the "reduction in demand for casino gambling by the residents of Puerto Rico" that the government claimed was the result of the ban constituted the necessary substantial government interest, (3) the statute directly advanced the government's substantial interest because the legislature could reasonably believe that "advertising of casino gambling aimed at the residents ... would serve to increase the demand for the product advertised," and (4) the restrictions were "no more extensive than necessary to serve the government's interest."

The casino had argued (1) the statute was too restrictive because it allowed advertising for other types of gambling such as lotteries, horse racing and cockfighting, (2) the government could more effectively reduce the demand for casino gambling by promulgating speech designed to discourage gambling rather than suppressing speech that promoted this activity, (3) the activity involved here was similar to that in *Bigelow* and, therefore deserved the protection offered by that case, and (4) once the government legalized gambling, the First Amendment granted protection for advertising related to such activity.

The Court handily rejected all of the appellant's arguments and concluded that the prior restraint had passed the *Central Hudson* test and thus the advertising could make no claim of First Amendment protection.

How can the Court justify such severe restrictions on the advertising of a perfectly legitimate activity? Compare gambling with alcohol and tobacco, and you have some indication of the rationale used by the Court. The casino had argued that since the government had legalized gambling for both tourists and residents, *Bigelow* and its progeny would dictate that the First Amendment would prevent the government from imposing advertising restrictions that were specifically designed to discourage citizens from legal gambling. In other words, once an activity, product or service is legalized, the First Amendment says, "Hands off any advertising, unless it is deceptive or misleading." In strongly rejecting that argument, the Court said the argument should be turned on its head:

> [I]t is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising ... It would ... be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising ... Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution on the one hand ... to legalization of the product or activity with restrictions on stimulation of its demand on the other hand ...[93]

Justice William J. Brennan, Jr., (joined by Justices Thurgood Marshall and Harry A. Blackmun) contended in his dissent that the distinctions between commercial and noncommercial speech did not "justify protecting commercial speech less extensively where, as here, the government seeks to manipulate behavior by depriving citizens of truthful information concerning lawful activities."[94] According to Justice Brennan, even if the government had been able to demonstrate that a substantial interest was involved, there was no evidence that this particular regulation would address those interests. The dissenting opinion also argued that the government could have attempted to control the particular harms asserted such as organized crime and prostitution by keeping a tighter rein on the casinos themselves: "... it is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has sustained this burden."[95]

A close reading of the holding in *Posadas de Puerto Rico Associates* could appear to justify similar restrictions on the advertising of products such as tobacco and alcoholic beverages, items which the courts have consistently permitted to be regulated. In fact, anyone looking for a legal precedent to justify a ban on all cigarette or alcohol advertising probably needs to look no further than *Posadas*.

More Smoke: State University of New York v. Fox (1989)

The fourth prong of the of the *Central Hudson Gas & Electric* four-part test has caused considerable confusion among the lower courts in interpreting the meaning of "more extensive than necessary." Three years after *Posadas*, the U.S. Supreme Court attempted to pinpoint the applicable standard but appeared to create more smoke than light. In *Board of Trustees of State University of New York v. Fox* (1989),[96] a university regulation banning private companies from sponsoring parties in student dormitories when housewares are being promoted was challenged on First Amendment grounds. The Second Circuit U.S. Court of Appeals, in overturning the rule, held that the standard for determining whether the regulation was no more extensive than necessary was that the state must use the "least restrictive measure" that could protect the state's interest. This holding, at first analysis, may appear to in line with *Hudson* and even *Posadas* but, on appeal, the U.S. Supreme Court, in a 6-3 decision authored by Associate Justice Antonin Scalia, disagreed with the U.S. Court of Appeals and remanded the case back to the lower court for further findings.

According to the majority opinion, the appropriate standard for determining whether the regulation is more extensive than necessary is that the restrictions must be "narrowly drawn" and "no more extensive than reasonably necessary" to further the substantial government interest. The Court note that even for political speech, the "least restrictive measure" test had not been applied in determining the constitutionality of reasonable time, place and manner restrictions but instead the test has been whether the regulations are "narrowly tailored" to promote a significant state interest. The Court also noted that a similar test has been applied in determining the validity of restrictions on expressive conduct, including that in a political context. Thus, the Court reasoned, it would be inappropriate "to apply a more rigid standard" for commercial speech than for other forms of speech that presumably had greater protection. Or, as the Court said, "[W]e think it would be incompatible," given the "subordinate position" of commercial speech "to apply a more rigid standard in the present context."[97]

How should this test be applied? Since the state is not required to demonstrate "the manner of restriction is absolutely the least severe that will achieve the desired end," a balance, or "fit" as the Court called it, must be found between the asserted governmental interest and the approach taken to accomplish that interest --

> a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in 'proportion to the interest served' ... ; that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may be best employed.[98]

While to the untrained observer, this case would appear to involve more semantics than real distinctions, the fact is that the holding represents a significant retreat from the standard that many courts, including the Second Circuit U.S. Court of Appeals, believed applied in commercial speech cases in light of *Central Hudson Gas & Electric*. No doubt it will be much more difficult for governmental restrictions on commercial speech, including advertising, to be struck down as unconstitutional, and thus we can expect a wave of new forms of restrictions that will have to be tested in the courts. History has shown that when a First Amendment standard is relaxed, as was the case here, the government is usually ready to step in and assert its broadened authority to regulate speech. We can expect to see renewed clashes between the commercial speech activists and legislators.

It is interesting that the Court did not rule on the constitutionality of the university regulation but instead remanded the case back to the trial court for a determination. Thus the restrictions could still be struck down but a balancing test would be performed, using the relaxed standard enunciated by the Court.

Summary and Conclusions

Legal scholars and jurists refer to court holdings that set clear Constitutional boundaries as *bright line* cases since they establish what types of actions and speech are protected from state regulation. Bright lines are rather rare in media law. Instead, the U.S. Supreme Court and other courts generally eschew them for the muddy waters of obfuscation. From *Valentine v. Chrestensen* to *Board of Trustees of the State University of New York v. Fox*, the development of a "commercial speech doctrine" has been more akin to the assembling of a tinker toy than the evolution of a definite test.

Central Hudson Gas & Electric v. New York PSC, with its four-part test for determining whether commercial speech is protected by the First Amendment, was certainly a positive step toward the creation of a bright line. Unfortunately, *Posadas* muddied the waters again, and the holding of the recent *Board of Trustees v. Fox*, with its strange and cumbersome reasoning, appears to be an even more prounced step off the path toward clarity and conciseness in the doctrine.

Footnotes

1. Advertising Age, Sept. 24, 1987 and 1 LINK 41 (1989).
2. *USA Snapshots: Growth in Political Ads*, USA Today, March 21, 1989, at A1.
3. Trustees of the State University of New York v. Fox, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1989).
4. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, 1 Med.L.Rptr. 1907 (1942).
5. *Id.*
6. Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 920, 86 L.Ed. 1262, 1 Med.L.Rptr. 1907 (1942).
7. *Id.*
8. *Id.*
9. Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943).
10. *Id.*
11. Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).
12. Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).
13. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 1 Med.L.Rptr. 1527 (1964).
14. *Id.*
15. *Id.*
16. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).
17. Pittsburg Press Co. v. The Pittsburg Commission on Human Relations, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669, 1 Med.L.Rptr. 1908 (1973).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Bigelow v. Virginia, 421 U.S. 809, 96 S.Ct. 2222, 44 L.Ed.2d 600, 1 Med.L.Rptr. 1919 (1975).
24. *Roe v. Wade.*
25. *Bigelow v. Virginia.*
26. *Id.*
27. Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346, 1 Med.L.Rptr. 1930 (1976).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977).

37. *Id.*
38. Hugh Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675, 2 Med.L.Rptr. 1935 (1977).
39. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).
40. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, 2 Med.L.Rptr. 2097 (1977).
41. *Virginia State Board of Pharmacy.*
42. *Bates v. State Bar of Arizona.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) and *In re* Primus, 436 U.S. 412 (1978).
49. *Id.*
50. *Id.*
51. First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, 3 Med.L.Rptr. 2105 (1978).
52. Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979).
53. Consolidated Edison Co. v. Public Service Commission of New York, 444 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319, 6 Med.L.Rptr. 1518 (1980).
54. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341, 6 Med.L.Rptr. 1497 (1980).
55. *Consolidated Edison Corp.*
56. *Id.*
57. Red Lion Broadcasting v. Federal Communications Commission, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371, 1 Med.L.Rptr. 2053 (1969).
58. *Consolidated Edison Corp.*
59. *Central Hudson Gas & Electric Corp.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *In re* R___ M. J___, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982).
67. The bar rules permitted attorneys to send such announcements only to "lawyers, clients, former clients, personal friends and relatives."
68. American Medical Association v. Federal Trade Commission, 638 F.2d 443 (2d Cir. 1980).
69. American Medical Association v. Federal Trade Commission, 455 U.S. 676, 102 S.Ct. 1744, 71 L.Ed.2d 546 (1982).
70. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983).
71. 39 U.S.C.S. 3001(e)(2)
72. *Bolger v. Youngs Drug Products Corp.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Condom Makers Want Message on TV,* Knight-Ridder News Service, Lexington (Ky.) Herald-Leader, Nov. 8, 1988, at D2, col. 1.

77. *Id.*
78. Lauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).
79. *Id.*
80. Ky. Rules of the Supreme Court 3.135(5).
81. Shapero v. Kentucky Bar Association, ___ U.S. ___, 108 S.Ct. 1916, ___ L.Ed.2d ___, ___ Med.L.Rptr. ___ (1988).
82. *Id.*
83. Curriden, *Making Airwaves*, A.B.A.J., July 1989, at 38, 40.
84. Ky. Rules of the Supreme Court 3.135(5).
85. *Id.* 3.135(6)
86. *Attorneys and Advertising: Yellow Pages and Red Tape?*, YELLOW PAGES UPDATE, July-Aug. 1988, at 6-8.
87. *Id.*
88. Marcotte, *Lawyer Ads -- The Next Step*, A.B.A.J., Aug. 1, 1988, at 17-18.
89. Blodgett, *A Guide to Successful Marketing*, A.B.A.J., Aug. 1, 1988, at 19-20.
90. Reynoldson, *The Case Against Lawyer Advertising*, A.B.A.J., Jan. 1989, at 60-61.
91. Anonymous v. Grievance Committee for the Second and Eleventh Judicial Districts of the State of New York, April 12, 1988.
92. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266, 13 Med.L.Rptr. 1033 (1986).
93. *Id.*
4. *Id.*
5. *Id.*
5. *Trustees of the State University of New York v. Fox.*
. *Id.*
. *Id.*

THE FAIRNESS DOCTRINE, THE CITIZENS AND THE RADICAL RIGHT-WING:
In re the Application of KAYE Broadcasters, Inc.

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THE FAIRNESS DOCTRINE, THE CITIZENS AND THE RADICAL RIGHT-WING:
In re the Application of KAYE Broadcasters, Inc.

Introduction

In the current debate over broadcast regulation, advocates of deregulation claim that regulation has a "chilling effect" on broadcasters while advocates of "re-regulation" point to abuses in the recently deregulated broadcast marketplace as evidence of the need to reintroduce rules such as the Fairness Doctrine into the marketplace. All agree that the Federal Communications Commission's (FCC) efforts have fallen short of the goal of "the widest possible dissemination of information from diverse and antagonistic sources."[1]

Ignored in this debate and for the most part treated as a footnote in the history of broadcast regulation are regulatory case histories from the late-1960s and early-1970s, a period when the Fairness Doctrine was used aggressively to remove speakers from the broadcast marketplace. Greater diversity was the intent, but the result, arguably, was less diversity.

Red Lion Broadcasting v. FCC (1969), a landmark case in First Amendment broadcast law, is the best known of these cases. Its doctrinal importance has been discussed extensively, but little attention has been paid to the fact that the broadcaster in Red Lion was a political rather than a commercial broadcaster or to the other challenges that make up the history of the period.[2]

The difference between a commercial broadcaster and a political broadcaster is at the is at the core of the broadcast regulation First Amendment conundrum. The marketplace of ideas concept of the First Amendment assumes a public forum populated by speakers whose primary goal is to influence political debate. The marketplace works best when "it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[3] Yet most broadcast licensees are commercial broadcasters whose primary concern is attracting a large audience. Avoiding controversy, not generating it, is the goal of many commercial programmers.

Is the licensee a speaker standing on a soapbox in an electronic town square or a trustee obligated to provide fair and balanced programming in the public interest? Is the broadcaster's primary purpose the spreading of political ideas or the operation of a commercially viable broadcasting property? Which role better serves the interests of a democratic society?

Writing in dissent in Brandywine-Main Line Radio v. FCC (1972), Judge David L. Bazelon argued that the silencing of extremist broadcasters harmed the diversity in the marketplace that the Fairness Doctrine was intended to enhance. "It is," he wrote, "beyond dispute that the public has lost access to information and ideas...as a result of a single blow of this doctrinal sledgehammer."[4]

The thrust of Judge Bazelon's dissent--that enforcement of a regulation intended to promote diversity had resulted in a less diverse marketplace of ideas--was directly in conflict with the beliefs of citizen watchdog groups. They argued that broadcast licensee-holders had a responsibility to provide fair and balanced programming. Broadcasters were licensed to use to serve the "public interest, convenience and necessity," not to use a part of the limited broadcast spectrum as a personal soap box for extreme ideas.

The operators of KAYE-AM, a 1000-watt daytime, 250-watt nighttime, right-wing, religious radio station in Puyallup, Washington, believed they had access to an electronic soapbox. The Puget Sound Committee for Good Broadcasting (PSC) and the United Church of Christ (UCC) believed KAYE had an obligation to present fair and balanced programming. They successfully challenged KAYE's application for license renewal. The case presents an opportunity to examine the operation and the effects of FCC enforcement of the Fairness Doctrine on a small, poorly-funded speaker operating at the edge of the broadcast marketplace.

In 1971, the Rev. Everette C. Parker of the UCC called the KAYE case "precedent-shattering." The FCC decision would, he said, "go a long way toward cleansing the airwaves of scores of hate stations over the country."[5]

The Fairness Doctrine in the 1960s and early-1970s

In the late-1960s and early-1970s, right-wing radio preachers, such as the Reverend John M. Norris of WGCB in Red Lion, Pennsylvania and Dr. Carl McIntire, the license-holder of WXUR in Media, Pennsylvania, claimed that the use of radio stations to advocate extreme political and religious ideas served the goal of diversity. The FCC, in response to pressure from the UCC and other "watchdog advocates," used the Fairness Doctrine to promote diversity through fair and balanced broadcast programming.[6]

The Supreme Court of the United States addressed these competing views in Red Lion. It held that the Fairness Doctrine, and the Personal Attack Rule were not in conflict with the First Amendment. The case stands for the principle that the audience's right to a diversity of broadcast voices is paramount and therefore, the government may regulate broadcast content to a limited degree in order to ensure fair and balanced programming.

In Brandywine-Main Line Radio, the first major test of Red Lion, the Court of Appeals for the District of Columbia upheld the FCC's denial of license renewal for McIntire's WXUR.[7]

Citizen groups had begun to challenge broadcast license renewal applications in the early 1960s, but they did not have clear legal standing until Office of Communication of Church of Christ v. FCC (1966).[8]

The effect was immediate. One commentator called the reaction, "an explosion of citizen group involvement in broadcast regulation." By 1970, the FCC had between sixty and one hundred renewal applications pending due to last minute intervention by citizens groups. In 1971, the FCC reported to Congress that "Some 20 renewal applications--a record number--were designated for hearing in fiscal 1971." At least six of the hearings concerned violations of the Fairness Doctrine or other content regulations.

The new activist posture of citizen groups forced the FCC to take a harder look at requests for license renewal. FCC review had been perfunctory in the absence of a renewal challenge. One result was confusion over the definition of licensees' obligations under the Fairness Doctrine, the Personal Attack

Rule, ascertainment and public affairs programming. The Commission was reluctant to issue specific guidelines and attempted to evaluate complaints on a case-by-case basis.

The FCC's review policy delayed the processing of petitions, and created uncertainty for broadcasters and license challengers. In 1969, a congressional report said the Fairness Doctrine was "so ephemeral as to defy comprehensive description." Congress called for definitive rulemaking to clarify the Fairness Doctrine and the Personal Attack Rule.[9]

In this climate, KAYE Broadcasters applied for license renewal and the PSC filed a petition to deny.

In Re Application of KAYE Broadcasters, Inc.

KAYE-AM was a weak voice in the Seattle-Tacoma, Washington radio market, but it attracted attention. The station blended fundamentalist religious beliefs with angry right-wing conservative politics. A Seattle newspaper columnist said KAYE was "an outlet whose ultraright voice makes the John Birch Society sound like a bunch of yippies."[10]

Jim Nicholls, a self-described "Bible believing preacher" had gained control of the station's programming in 1968 and shifted the programming mix toward politically oriented call-in talk shows and conservative syndicated programs. Politics and religion, not profits, drove the programming.[11]

Mabel Rupe, a retired Methodist missionary and a monitor for PSC told the Christian Herald that the station regularly broadcast "tirades against civil rights, pacifists, urban renewal, National Council and World Council of Churches, gun laws, ecumenism, welfare recipients, Supreme Court decisions and Negroes." She acknowledged that the station's open mike format allowed callers to express other views, but said, "the sensible side is not represented by more than a half hour a week through a few courageous ones who call in." Seattle Magazine said that "Day after day, hate has been brewing from down in the Puyallup Valley where the talk-show lines of radio Station KAYE buzzed with vituperation."[12]

A Representative Program Day

On an average program day, KAYE broadcast at least six hours of call-in talk show programming, and more than two hours of syndicated right-wing religious commentary. The August 1, 1968 broadcast day began at 6:00 a.m. with national and local news and weather, followed by religious music. Dr. Carl McIntire's "Twentieth Century Reformation Hour" followed at 6:15 a.m. McIntire's half-hour program attacked the World Council of Churches for supporting Communism. Religious music, the "Radio Gospel League," a local religious program, the "Family Altar Program," with Evangelist Lester Roloff of Corpus Christi, Texas, and fifteen minutes of conservative commentary on H.L. Hunt's "LifeLine" filled the next hour and forty-five minutes.

From 8:00 to 8:15 Nicholls commented on the war in Viet Nam, urged the audience to pray, and encouraged support of the Tacoma Servicemen Center. Syndicated commentator Howard E. Kirschner then discussed U.S. relations with Greece, Charles de Gaulle's view of capitalism, United Nations recognition of Rhodesia and the national debt.

After the 8:30 a.m. news, "Party Line" a call-in show hosted by Nicholls ran until noon. Virginia Shackelford, a conservative political activist in Tacoma and a regular guest on "Party Line" was in the studio. For more than three hours, Nicholls, Shackelford and numerous callers discussed crime and politics in Tacoma, gun control, "sensitivity training," the World Council of Churches, welfare abuse, urban renewal, fluoridation, Viet Nam, the United States Supreme Court and Associate Justice Abe Fortas, the difference between "collectivist" and "individualist" ideology, and presidential politics.

Afternoon and early evening programming included popular music and a one-hour live report from the hydroplane races on Lake Washington near Seattle.

From 7:00 to sign-off at 10:00, the call-in format returned with the "Round Table Forum," hosted by "Dr. Jon Gold". Crime in Tacoma, the Tacoma Police Department and criticism of Tacoma City Manager Dave Rowlands filled most of the evening. A.L. "Slim" Rasmussen, the Mayor of Tacoma and an opponent of Rowlands, was one of the callers that evening.

The broadcast day ended with the playing of the "Star Spangled Banner."[13]

Nicholls and Gold were not interested in simply providing a forum for public discussion. In 1970, Gold wrote, "Round Table Forum was designed and brought forth with the single purpose of defeating the aims and measures of City management government." His "high anger" broadcasts directed at local officials were among the more vitriolic programming on the station.[14]

The City Manager Controversy

Tacoma is a largely blue collar port city south of Seattle.[15] The city has a long history of contentious politics. From 1951 to the late-1960s, the structure of city government was a political litmus test in Tacoma. One political scientist refers to a "city charter ideology." Proponents of the existing council-manager structure were overwhelmingly Republican members of the Tacoma elite living in the "North end" of the city, while those who favored a council-mayor structure were working-class Democrats living in the "South end" of town.[16]

In the 1967 mayoral race candidate A.L. "Slim" Rasmussen, a colorful populist state senator from South Tacoma, campaigned against the council-manager system. Rasmussen won but held only a one vote margin on the City Council. He immediately took steps to undermine Dave Rowlands, the "liberal" long-time City Manager.[17]

By January, 1968, a majority on the Council supported a resolution to, once again, put the council-manager issue on the ballot. Rasmussen's council-mayor forces lost the hotly contested election.[18]

In 1969, Gordon Johnston unseated Rasmussen. Johnston had promised to fire the city manager. Rowlands resigned. The council attempted to appoint Rasmussen as City Manager, but when that proved to be legally impossible and politically unwise, it appointed Floyd Oles, a former KAYE commentator and Rasmussen ally, to the post.

Several financial conflict of interest scandals later, competing recall measured were placed on the ballot. One introduced by a relatively liberal "Recall Committee" was directed at the conservative majority on the council. The other, offered by "Save Our American Principles" (SOAP), targeted the new mayor and three other members of the council. The voters recalled the council majority.[19]

KAYE in Tacoma Politics

Rasmussen's tenure as mayor has been described as "government by uproar." KAYE helped raise the decibel level. Rasmussen was a regular guest on KAYE talk shows while his opponents rarely braved the unfriendly forum offered by KAYE's commentators and audience. Rowlands declined repeated invitations to appear and ordered City department heads to do the same.[20]

The tone of Jon Gold's "invitation," dated 6 January 1969, helps explain Rowland's reluctance:

> This is approximately the tenth or eleventh time that I have written to you and asked you to appear as a guest on my program. It is possible that a busy city administrator may not find the time for such a mundane matter as...speaking with the people. However, this does not excuse your policy of forbidding other city officials their right to meet and talk with the people of this area.
>
> I point out to you that this type of censorship is alike with [sic] the worst of foreign dictators...[21]

Beginning in November, 1967 at the request of newly elected Mayor Rasmussen, the station broadcast gavel-to-gavel coverage of the weekly Tacoma City Council meetings. The meetings lasted an average of seven hours and rarely failed to entertain.

KAYE's broadcast the proceedings without comment, but Gold and Nicholls made their support of Rasmussen clear in commentary before and after the meeting broadcasts and seemed to anticipate and encourage controversy. In promoting one broadcast, Nicholls said, "Now don't forget that at 4 o'clock this afternoon it is the Tacoma City Council....I think we need to realize that the City of Tacoma is in some deep problems, and er, it's unthinkable to blame the present regime [Rasmussen's] for these deep problems...[A]t 4 o'clock it looks like it is going to be a very warm time in the old time tonight.[22]

While waiting for the first Council meeting following Rasmussen's defeat to begin, Gold observed, "In other words, its unfortunate, but nevertheless, that is the attitude the new Mayor [Johnston] seems to have taken as he approaches that hour when he takes over here at City Hall....[I]t is my assumption that many of the Council right now do not welcome many of Mr. Johnston's statements...I think perhaps we have a situation here that will wind up in some real extensive fireworks over the next few years.[23]

KAYE's coverage of Tacoma politics was badly slanted and vicious. On 30 January 1969, Gold linked Rowlands with Nazi Germany:

> ...our Horst Wessel song...is dedicated, of course, to Mr. Rowlands, and to what I consider to be the most purely fascist government in North America, the city-manager form of government....(As the song plays in the background) ...Tonight we introduce the first playing of that beautiful song of Nazi Germany's national Nazi party, the Horst Wessel song.[24]

Criticism of government social programs laced with strong racist sentiments is present in much of the political commentary on the station. In September 1969, Gold said the following about City Human Relations Director Lynn Hodges:

> Mr. Hodges, you're a liar. And I pointblank tell you over this microphone. Mr Hodges, you are a liar....You and your ilk - you and some of those followers that

> follow you around - you and your gun-toting friends - you are the ones that made this a racist town and you are the racist, Mr. Hodges. You are one of the chief problems this town has to face and I say this - next to getting rid of Dave Rowlands, the best way to bring peace to this town is to eliminate you. Fire you and get you out of here...You who haven't got the guts to come out and sit down and talk things over....When we did have a couple of riots, where were you Mr. Hodges?- ...It looks awfully suspicious that you are always unavailable.[25]

On 1 August 1968, Nicholls attempted to refute the claim that the station was unfriendly to Blacks by pointing to the fact that he had invited members of the Tacoma Black community to appear on the station and by observing that on the next Saturday night "a colored gentleman...that's right, a colored gentleman," was scheduled to appear on "Round Table Forum."[26]

On another night, Gold said, "Go ahead, black man, pick up your guns, pick up your Swahili clothes and then say to your master Mr. Rowlands: 'Which we go boss..."[27]

The Puget Sound Committee for Good Broadcasting's Petition

KAYE's unrelenting radical right-wing programming and personal attacks prompted the formation of the Puget Sound Committee For Good Broadcasting (PSC). PSC and the Anti-Defamation League of B'nai B'rith, with the assistance of the Office of Communication of the United Church of Christ, built a record that led to the denial of KAYE Broadcasters, Inc.'s request for license renewal.[28]

PSC first complained to the FCC in 1967. By 1969, when KAYE's license was up for renewal, it was prepared to petition for a denial of license renewal. Alleged violation of the Fairness Doctrine was the heart of claim:

> KAYE devotes a considerable amount of broadcast time to criticism of the [Tacoma, Wash.] City Manager and other City officials and to praise of the minority of councilmen...whose views are similar to Mr. Nichols [sic]. KAYE devotes almost no broadcast time to presentation of the other point of view.[29]

The Committee claimed that KAYE was not meeting its general obligations under the Fairness Doctrine or under the more specific equal time and personal attack rules of the Communication Act of 1934. Other charges included manipulation of phone-in programs, false rating claims and false statements by KAYE to the commission, failure to make a proper survey of its communities needs and disregard of the Commission's procedural rules.[30]

The PSC was a region-wide committee based in Seattle and affiliated with the Washington State Council of Churches. The list of PSC members included officers and governing board members from a wide range of leading civic, cultural and business organizations and churches in the Tacoma area. Of the sixty-nine members listed in the petition, forty were women, eleven were clergy, ten sat on church boards, thirteen were educators, six were housewives, and two were medical doctors. The membership included several bank officers, presidents and vice presidents of major local businesses, and a retired Army General who had been an editor of Stars and Stripes.[31]

The UCC provided legal counsel and technical assistance as PSC volunteers built a record against KAYE. They monitored KAYE programming between January 1968 and September 1970. Dr. Ralph F. Jennings, a communications analyst with the UCC, analyzed a representative week of KAYE programming (2-9 August 1968). Volunteers recorded and transcribed more than sixty-two reels of tape.

PSC documented more than one hundred and fifty instances where individuals or groups had been subjected to personal attacks on the air without being given an opportunity to respond and numerous violations of the Fairness Doctrine requirement that broadcasters provide fair and balanced coverage of matters of public controversy.[32]

The KAYE license renewal was caught in the FCC processing log jam as a result of the station's late filing of required documents and the PSC challenge. In the fourteen months between the filing of the PSC petition and the beginning of hearings, Nicholls, Gold and other KAYE talk show hosts continued to attack assorted local and political figures and took on their opponents in the licensing proceedings. The Saturday Review noted that "instead of modifying its behavior, [KAYE] has intensified it."[33]

Nicholls and Gold were aware that the station was being watched. They accused the monitors of more than tape recording:

> [A]ny of the people who regularly bug our phones or tap our lines or record or any of this sort of thing, they might as well turn off their recorders today...they can have the day off because I don't think we'll be giving them any trouble or worries or problems today.[34]

Nicholls argued in the Northwest press and on-the-air that the "attack" was "basically political." KAYE had met its obligations under the Fairness Doctrine and most of the claimed personal attacks had been political commentary, he claimed. "Our trouble all started when the station took a stand against the Russians," he told Victor Stredicke, the radio editor of the

Seattle Times. His opponents were all "liberal Democrats," he added.[35]

At least two commentators in the Northwest seemed to share Nicholls view and saw the PSC's action as a threat to freedom of the press. J. Michael Kenyon of the Seattle Post-Intelligencer, cast a jaundiced eye on the whole affair. In a series of columns he suggested that the PSC and the UCC were talking about "responsible broadcasting," but the real motives had more to do with stopping the broadcasting of political ideas they did not like.[36]

Bob Roberts, a commentator on KVI radio in Seattle, took a more direct route to a similar conclusion:

> The specter of censorship hovers closer to home...I know of no more reprehensible undertaking right now than that of an organization calling itself the Puget Sound Committee for Good Broadcasting, which seeks to prevent renewal of the broadcast license of radio station KAYE in Puyallup....And what has KAYE done to earn this impassioned antipathy?...It has consistently advanced an editorial and philosophical point of view...The crux of this complaint is that this point of view is conservative in tone and outlook[37]

Nicholls claimed that advertisers were leaving the station because of a "boycott" organized by "A group of vicious women, that's the only way I know to tell to describe them, they're very vicious women." He urged listeners to send money, first to the KAYE "Bucks for Broadcast" fund and later to the "Truth and Justice Fund."

The initial response to the call for funds was impressive. In early-December, 1970, Nicholls reported contributions of $25,000. However, at this early stage of the hearing process, Nicholls claimed legal fees of $16,000. In June 1971, after the initial ruling against KAYE, Nicholls put the cost of the litigation at $95,000. PSC reported expenses of $38,000.[38]

By September, 1970, prehearing conferences were underway. KAYE hired Benedict P. Cottone, a former general council to the FCC who also represented conservative radio preachers Carl McIntire and John Norris before the FCC, to argue its case.[39]

Hearings opened in Seattle on 18 November 1970. From the first day it was clear that a personality conflict between Cottone and hearing examiner Ernest Nash would dominate the proceedings. Cottone immediately claimed that the location presented great hardships for KAYE and requested a move to Tacoma. In contrast to most of the battles to follow, Cottone prevailed. The hearings moved to Tacoma on 23 November.[40]

Nash quickly became unhappy with the atmosphere in the Tacoma hearing room. In 1972, he wrote that the written record did not capture such scenes "as 'Mr. Cottone striding to the dais and picking up a heavy book which he then banged on the table almost in my face while shouting' or 'the snickers and giggles by which Mr. Cottone communicated with the often appreciative audience of the applicant's partisans.'"[41]

Loyal KAYE listeners wearing "KAYE Kountry Citizen" buttons packed the hearing room. On several occasions the audience responded to testimony or questions with jeers or applause. A newspaper reporter described the KAYE supporters as coming "from all economic levels, but for the most part [they] are plain people, sincere, overly suspicious about anything that might be part of 'the forces trying to destroy KAYE and free speech.' And their devotion to Nicholls seems to border on worship."[42]

Nash showed little patience with Cottone or with KAYE witnesses who frequently elaborated where the Examiner believed a "yes" or "no" would suffice. With Slim Rasmussen on the witness stand, the first major blow up of the hearing took place. As Cottone started to ask a question Nash suddenly sustained an objection. However, none of the participants in the hearing had objected to the question. After a heated exchange among Rasmussen, Nash and Cottone, Cottone said, "You are not permitting us to ask clear questions and this is bordering on Star Chamber and Kangaroo." Nash responded, "Will the record show that Mr. Cottone's last remarks were greeted by a wave of applause. This is not the first occasion that occurred. Do you consider it consistent with your responsibility as a lawyer to make statements which would result in applause from the audience?"

After additional heated exchanges over Rasmussen's expansive responses and Cottone's line of questions and more applause from the audience, Nash excused Rasmussen, ordered his testimony stricken from the record, and returned the hearing to Seattle.[43]

On 11 December, near the end of a week of hearings, Nash accepted into evidence forty-three PSC exhibits. He gave Cottone the weekend to review the extensive new material and offer objections.[44]

On Monday, after Nash rejected KAYE's motion for a three month recess, Cottone refused to proceed. Nash closed the record. In June, 1971, Nash rejected KAYE's request for license renewal. The first sentences in his decision sums up the record:

> There is an abundance of evidence in this proceeding that KAYE broadcast discussion of controversial issues of public importance. There is an abundance of evidence that KAYE broadcast personal attacks upon individuals and identifiable organizations. There is virtually no showing that KAYE afforded reasonable opportunity for the presentation of contrasting views(emphasis added).[45]

KAYE appealed Nash's decision and unsuccessfully tried to exclude Nash from the proceedings. The case was sent back to Nash so that KAYE could complete the rebuttal phase of the hearing.[46]

In the subsequent hearings Nash and Cottone continued to clash until Nash ejected Cottone from a hearing in September, 1972. Cottone responded in terms rarely heard in a FCC hearing:

> I have a prepared statement to make. I want to make this statement. 'Your mind sir, is a cesspool of filth, venom, venality, bias, and prejudice. To call you a savage would cast aspersion on innocent savages. If I believed you had any semblance or vestige of rationality, I would call you a very, very, evil man...'[47]

In December, 1972 Nash issued an order denying the license renewal for failure to prosecute. Once again KAYE appealed.[48]

But Nicholls had exhausted all available funds. Cottone told McIntire that KAYE's source of funds had "dried up completely."

He owed Cottone over $60,000 for legal fees and other creditors were circling.[49]

Nicholls appealed to the American Civil Liberties Union for support. "KAYE in two hearings under the FCC administrative law judge has not had a chance to defend itself, its attourney [sic] has been thrown out of the hearing chambers twice." "For the constitutional violations stated and the gravity of the situation of government licensing of broadcasting," Nicholls wrote, "I ask for the assistance of the ACLU."

The ACLU responded but did not get involved. Melvin L. Wulf, Legal Director of the ACLU in New York wrote Cottone asking for additional information about the case. "The KAYE people, I am told," he wrote, "seem to anticipate some difficulties in that proceeding because of their conservative political position."[50]

In 1973 Nicholls sold his interest in KAYE Broadcasters for $10,000 and assumption of $27,500 in personal debt. At the same time the station signed promissory notes totaling $66,681 with Cottone. KAYE, now operating under the call letters KUPY, continued to broadcast.[51]

Nicholls continued to fight the legal battle, but in 1979, acting as his own attorney, he failed to convince U.S. District Court Judge Jack Tanner that his damage suit against Nash had merit. Once again representing himself, Nicholls filed an unsuccessful appeal of Tanner's ruling with the Ninth Circuit.[52]

Conclusion

Judge Bazalon's observation in Brandywine-Main Line Radio that the silencing of extremist broadcasters limits the diversity of ideas in the marketplace rings true, and just as it applied to Carl McIntire's radical right-wing religious programming it applies to Jim Nicholls and KAYE. KAYE had a loyal audience and it served as a forum for political points of view listeners could not find elsewhere on the radio dial.

And, while KAYE ignored its Fairness Doctrine obligations, the record suggests that political orientation did play a role in the anti-KAYE movement. KAYE was advocating political views offensive to PSC members. This use of government regulation to suppress speech (no matter how offensive it may be) raises fundamental First Amendment questions.

But is that a strong enough rationale for rejecting the Fairness Doctrine and other forms of government regulation of content in broadcasting? The answer to that question depends, in part, on the status of a broadcast license-holder under the First Amendment.

Nicholls and the other speakers on KAYE had a right to express their ideas--no matter how hurtful or distasteful they may be--but the right to operate a licensed broadcast station for the purpose of expressing those ideas does not necessarily follow. Is government licensing of broadcasters simply a question of directing traffic among electronic soapboxes or does the "public interest, convenience and necessity" language of the Communications Act of 1934 create an affirmative responsibility to not view broadcasters as independent speakers standing on electronic soapboxes? To put it another way, what public good is served when the government facilitates and sanctions the dissemination of personal attacks and racial slurs through the licensing process?

In the current debate over the revival of the Fairness Doctrine, advocates of the doctrine argue that the licensing process properly imposes responsibility on the licensee. The licensee is a trustee and to argue otherwise is to give the licensee "something for nothing." Opponents argue that content regulations have never worked and the Fairness Doctrine is "an idea whose time has gone." They tend to evoke an idealized marketplace of ideas as the framework for this position. However, both sides of the debate acknowledge that whatever the resolution, it will have a profound effect on interpretation and understanding of the First Amendment.[53]

The KAYE case highlights the inherent tensions between freedom of expression and government regulation of mass media. It provides a factual record against which the spectrum of free press theories and law can be examined. Hard cases may not make the best law, but they do force us to come down from rhetorical heights.

NOTES

The reference "KAYE, UW" will be used to indicate materials in the KAYE (Radio) #3788 files, Archives of the University of Washington, Seattle, Washington.

[1] Associated Press v. United States, 326 U.S. 1 (1945), quoted in, Metro Broadcasting, Inc. v. FCC, ___ U.S. ____ (1990). See, for example, Bill F. Chamberlin, "Lessons In Regulating Information Flow," North Carolina L. Rev. 60 (1982): 1057; Jerome Barron, "What Does the Fairness Doctrine Controversy Really Mean," Hastings Comm/Ent L.J. 12 (1989): 205; Richard E. Labunski, "May It Rest In Peace," Hastings Comm/Ent L.J. 11 (1989): 219; Matthew L. Spitzer, Seven Dirty Words and Six Other Stories (New Haven, 1986); Ford Rowen, Broadcast Fairness (New York, 1984); Robert B. Horwitz, The Irony of Regulatory Reform (New York, 1989).

The Fairness Doctrine, which the FCC rescinded in 1987, required broadcasters to cover issues of public controversy in a fair and balanced manner. The personal attack rule remains in place. It requires broadcasters who carry a personal attack on an individual or organization to notify the person or organization, provide a transcript of the attack and provide an opportunity to respond to the attack. For discussions of the Fairness Doctrine, see Hugh Carter Donahue, The Battle to Control Broadcast News (Cambridge, Mass., 1989); James Baughman, Television's Guardians (Knoxville, 1985); Erwin G. Krasnow, The Politics of Broadcast Regulation 3rd ed. (New York, 1982); Ford Rowan, Broadcast Fairness (New York, 1984).

[2] Red Lion Broadcasting v. FCC, 381 F.2d 908 (1967); aff'd 395 U.S. 367 (1969); Fred Friendly's, The Good Guys, The Bad Guys and the First Amendment (New York, 1975) is one of the few exceptions.

[3] Terminiello v. Chicago, 337 U.S. 1 (1949).

[4] 437 F.2d 16, 80.

[5] Frank Chesley, "Free Speech and KAYE," Seattle Post-Inteligencer [hereinafter cited as "P-I"] (10 June 1971): 11.

[6] The UCC, pursued two broadcast campaigns, the "Project to Combat Political Extremism" in the late-1960s and "Racial Justice in Broadcasting" in the early-1970s. For histories of the Office of Communication of the United Church of Christ in broadcast regulation, see, Steven Douglas Classen, "The Office of Communication of the United Church of Christ: A Search of Its History For Advocacy Models," M.A. Thesis (Univ. of Oregon, 1986); Ernest E. Phelps, "The Office of Communication: The Participant Advocate--Its Function As A Broadcast Citizen Group, March 1964 to March 1971" diss. (The Ohio St. Univ., 1971).

[7] Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972); cert. denied 412 U.S. 922 (1973) [violation of reporting standards and the Fairness Doctrine]. See, Fred W. Friendly, The Good Guys, The Bad Guys and the First Amendment (New York, 1975).

[8] 359 F.2d 994 (D.C. Cir. 1966). In 1964, the UCC intervened in the license renewal proceedings of WLBT-TV in Jackson, Mississippi.The station had a long history of racist programming. On several occasions, for example, a network news feed reporting the U.S. Supreme Court's decision in Brown v. Board of Education (1954) and portions of a 1963 documentary on the civil rights movement, the station interrupted the feed with a slide saying, "SORRY, CABLE TROUBLE." For a discussion of the WBLT case, see, Friendly, pp. 89-102.

Judge Warren Burger writing for a panel of the court, said that citizen groups had standing in FCC renewal proceedings. The significance of the case cannot be overstated:

> For the first time the public could make the broadcaster account directly for his stewardship of the airwaves...Without this decision (or one substantially like it) public interest law in the broadcast field would never have emerged.

[9] "Renewal protests swamp the FCC," Broadcasting (2 Nov. 1970): 168-69, "Stronger role for citizens groups," Broadcasting (7 Dec. 1970): 15-16; Classen, p. 31. also see, Preston R. Padden, "The Emerging Role of Citizens' Groups in Broadcast Regulation," Federal Communication Commission Bar Journal 25 (1972): 82-120. The backlog did not disappear until 1977. In December 1974, 280 petitions to deny were pending. By devoting more time and staff to the problem, the Commission reduced the backlog to 26 petitions on May 15, 1977. Barry Cole and Mal Oettinger, Reluctant Regulators (Reading, Mass. 1978): 208-209; FCC, Annual Report Fiscal Year 1971, pp. 56-57.

"Report recommends Fairness Reforms," Broadcasting (19 May 1969): 58-59; For a discussion of the FCC's interpretation of the "public interest" standard in licenses renewal proceedings during this period, see, Chamberlin, pp.1067-1074; Antonin Scalia, then the General Councel, Office of Telecommunications Policy, noted in an address to the Federal Communication Bar Association that the volumn of complaints and letters to the FCC concerning editorializing and controversial issues had increased from 409 in 1961 to 6,875 complaints alone in fiscal 1970. "Don't Go Near The Water" Fed. Com. Bar. J. 25 (1972): 114.

[10] Frank Chesley, "Battle of Puyallup," P-I, 10 July 1970, p. 26.

[11] KAYE Broadcasters Inc. purchased KAYE in 1966. Between 1966 and 1968, Nicholls controlled the talk show portion of the stations programming. He owned twenty percent of the stock and an option to buy another thirty percent with the remaining stock held by Hayden Blair. In 1968, Nicholls became a fifty percent

partner in the corporation. By the end of 1968, Nicholls was in total control of programming. Initial Decision of Hearing Examiner Ernest Nash, 1 June 1971, p. 6., KAYE, UW, Box 6.

Over a thirty year period he had been associated with churches in Vancouver, B.C., Fort William, Ontario, and North Battleford, Saskatchewan and had performed "itinerant work, traveling, ministering from church to church and also a preacher at seminars." KAYE was not formally affiliated with any church or religious organization but Nicholls had been a radio preacher in Canada and in the United States. He had some commercial radio experience before joining KAYE. Win Anderson, "KAYE On Line For Its Life At Hearing," Tacoma News Tribune, [hereinafter cited as "TNT"] 6 December 1970, p. D15; "License Hearing For KAYE Begins," Seattle Times, 19 November 1970, p. D15. Nicholls was ordained a "Minister of the Gospel" in 1944. He identified himself as being a Pentecostal. Nicholls v. Nash, "Opening Brief for Appellant" n.d. (c. 1977) p. 2. n.d. KAYE, UW, Box 6; 1970 License Renewal Hearings, Pg. 1-248," n.p. KAYE, UW, Box 9.

The station led a hand-to-mouth existence. For the first four months of 1968 showed a net profit of $1,835.35 on income of $22,057.88 and expenses of $20,222.53. By January, 1970 the station was attempting to generate listener contributions to stay afloat. "Financial Statement - April 30, 1968: Four Month Statement." KAYE, UW., Box 1; "Tacoma City Council Meeting, 1/6/70" KAYE, UW, Box 9.

[12] "Those Radio Call-in Programs," Christian Herald (February 1969), KAYE, UW. Box 1;Gordon Bowker, "Tacoma Fortissimo," Seattle Magazine 7 (May 1970), p. 30.

[13] "PSC's Monitored Period, Vol. 1, Aug. 1,2 [1968], pp. 1-439," KAYE, UW., Box 8; "Program Logs, Composite Week, 1968" KAYE, UW, Box 3. In addition, the station regularly broadcast Major Edgar Bundy's "Church League of America."

[14] Jon Gold, Murder Of A City--Tacoma (Twin Gates, Wash., 1970):73, 75. Gold's name was Fred L. Chrisman. His background before moving to Tacoma remains somewhat unclear.

[15] The Port of Tacoma, a large paper pulp mill and several nearby military installations, including Fort Lewis, McChord Air Force Base, and Madigan Hospital, form the economic foundation of the city.

[16] Richard William Crockett, "Institutionalized Political Conflict: The Tacoma City Council Recall Election of 1970," diss. (Univ. of Washington, 1974):52-58, 82. City and state investigations of corruption in the police department and city hall led to the three unsuccessful attempts between 1909 and 1951 to recall elected city officials and change the council-manager structure of city government to a council-mayor system.Richard Crockett makes a persuasive case that council members' stand on the council-mayor / council-manager issue defined the voting patterns of the council between 1953 and 1969.

Various city administrations through out the late-nineteenth and the twentieth centuries had tolerated or even encouraged illegal gambling and prostitution. In 1951, a mayor's "vice report" said, "Vice in every form is rampant, with a total lack of enforcement, or even acceptable police action." The City's Public Safety Commissioner responded that "a little vice isn't bad for any city."

[17] Ibid., p. 85, 93-95. Rasmussen, a populist Democratic State Senator from South Tacoma, entered the race after the Democratic majority of the State legislature with the cooperation of the Republican minority gerrymandered his strongly Democratic district. His new heavily Republican district became known as the "Rasmussen Stovepipe."

Rowlands had been instrumental in establishing a city Human Rights Commission, starting job training programs and winning federal Urban Renewal Grants for Tacoma.

[18] Ibid., pp. 93-98.

[19] Ibid., pp. 114-124, 205.

[20] Bowker, p. 35; Win Anderson, "Rowlands Didn't Want To Appear on KAYE," TNT (8 December 1970): 2.

[21] Letter, Fred L. Chrisman to David Rowlands, 6 January 1970, KAYE, UW, Box 10.

[22] "Transcripts of Monitored Broadcasts," Tape 19, Side I, p. 964-965. KAYE, UW, Box 8.

[23] "Minutes--City of Tacoma Council Meeting, 1/6/70," KAYE UW, Box 9. KAYE also carried live broadcasts of the Tacoma Human Relations Commission meetings from March 1969 to January 1970.

KTNT-AM-FM, the Tacoma radio stations of the Tribune Publishing Company, the publishers of the Tacoma News Tribune, the city's one daily newspaper, also started live coverage of the council. KTNT stopped in July, 1970, claiming that continued coverage would open the stations to excessive equal time requests. Proposed Findings and Conclusions Submitted On Behalf Of KAYE Broadcasters, Inc., 12 February 1971, pp. 22, 30, KAYE, UW, Box 6; Crockett, p. 198.

[24] Initial Decision, p. 13.

[25] Ibid. p. 12.

[26] "Fairness Log," p. 9. KAYE, UW. Box 8; When the focus of discussion turned to national affairs, the tenor of the comments remained the same. for example, see, telephone caller's comment that Sen. Warren Magnuson was as traitor and responsible for the deaths of American soldiers in Viet Nam, Exceptions of KAYE Broadcasters, Inc., 20 August 1971, Transcript of Party Line broadcast, 9 August 1968, p.2349-50, KAYE, UW. Box 2.

[27] "Hearing Accepts PSC Exhibits on KAYE," TNT (11 December 1970): A3; Michael J. Sweeney, "KAYE Lawyers Expected To Have a Busy Weekend," TNT, 12 December 1970, p.4.

[28] In January 1970, the Anti-Defamation League (ADL) joined PSC as an intervenor after KAYE broadcast a three-hour discussion of the "Protocols of the Elders of Zion," rabidly anti-semitic documents which are viewed by most as being a "notorious forgery." The ADL claimed that Larry Roe, the KAYE host, had treated the documents as genuine and "either...quoted from them knowing they were a forgery, or did so with reckless disregard of whether or not they were a forgery. In either case, Roe's statement fails to qualify for the constitutional protection of free speech. "ADL Says Radio Show Defames Jewish People" *Portland Jewish Review* (January 1970): 2, KAYE, UW. Box 1.

[29] *In Re Application of KAYE Broadcasters, Inc*, Petition of Puget Sound Committee for Good Broadcasting, p. 2, KAYE, UW, Box 2; Cole, p.211.

[30] "Discouraging Words Bring Appeal For FCC Action," *Broadcasting* (28 April 1969): 70; In Re Application of KAYE Broadcasters, Inc., 25 F.C.C. 2d 96.

[31] *Among the organizations and church memberships were the following*: Church Women United, NAACP, American Cancer Society, Woman's Auxiliary of County Medical Society, Tacoma Orthopedic Guild, Urban League, League of Women Voters, American Association of University Women, YWCA, Tacoma Community College Foundation, United Givers Fund, Kawanis International, Municipal League, CYO, Faculty Wives of University of Puget Sound, Olympia Presbyterial Association, Tacoma Chamber of Commerce, Tacoma Housing Board Authority, and Goodwill Industries. *Petition for Intervenor Status and Denial of License Renewal*, 14 April 1969, Appendix B, KAYE, UW, Box 2.

[32] *Initial Decision*, p.7.

[33] Robert Lewis Shayon, "Sad Sack in Puyallup," *Saturday Review* (11 July 1970): 39; Victor Stredicke, "F.C.C. Hearing on KAYE, Puyallup, *The Seattle Times*, (7 August 1970): C3.

[34] Nicholls, Transcripts of Monitored Broadcasts, p. 1454. KAYE, UW, Box 8; *also see*, Gold, *Murder*, p. 77.

[35] Victor Stredicke, "Controversy Continues On Puyallup's KAYE," *The Seattle Times* (24 August 1969): 22 TV; J. Michael Kenyon, "KTW Radio Preacher Enters Puyallup Fight," P-I (2 May 1969): 33. Stredicke's and Kenyon's coverage of the issue suggested some support for KAYE. A newspaper clip of one of Stredicke's stories apparently sent to Nicholls from Seattle has "This man is a conservative + a fine young man" written in script along the side. Newspaper Clips. KAYE, UW. Box 1. Stredicke was the Radio Editor of the Seattle Times. Frank Chesley, the radio

columnist for the Seattle Post-Intelligencer, seemed to favor PSC.

[36] J. Michael Kenyon, "Church Fires at Puyallup Station," P-I (30 April 1969): 43, " KTW Radio Preacher Enters Puyallup Fight," P-I (2 May 1969): 33, "Of Those Who Would Sever the 'Lifeline'," P-I (1 May 1969): 48.

[37] Bob Roberts, "Censorship Begins At Home," KVI News Commentary (1 December 1969); also see, "'Voices of Reason' Go Gunning For Nicholls" KVI News Commentary (8 July 1969), KAYE, UW, Box 1.

[38] Transcript of Tape 344, Side One, (1 September 1970): 1, KAYE, UW, Box 8; Win Anderson, "KAYE On Line For Its Life At Hearing," TNT (6 December 1970): D15; Chesley, "Free Speech and KAYE, P-I, 10 June 1971, p. 11.

The license renewal was not the only legal action draining the financial resources of KAYE. The station had three libel suits pending and an outstanding judgement of $17,500 from a 1968 slander suit. J. Michael Kenyon, "Of Those Who Would Sever The 'Lifeline'," P-I, 1 May 1969, p. 48; Harris v. KAYE Broadcasters, KAYE, UW. Box 6.

[39] The PSC was represented by Morton I. Hamburg and Nancy Hollander, UCC-supplied FCC Bar attorneys based in New York City. Sol Rabkin represented the ADL and Joseph Chachkin and Sheldon Guttmann were the lead attorneys for the Broadcast Bureau of the FCC. Initial Decision of the Hearing Examiner, pp. 1,3. KAYE, UW. Box 6.

[40] "License Hearing for KAYE Begins," Seattle Times (19 November 1970): D15; Initial Decision, p. 5. Cole and Oettinger note that the personality conflict between the Nash and Cottone and the large number of procedural and technical issues raised in the KAYE proceeding are "not typical--very few cases get so embroiled in personalities and technicalities." Reluctant Regulators, p. 212.

[41] "FCC's Nash raps conduct of owner, counsel of KAYE," Broadcasting (11 December 1972): 26.

[42] Win Anderson, "KAYE On Line For Its Life At Hearing" TNT, 6 December 1970, p. D15.

[43] Exceptions of KAYE Broadcasters, 20 August 1971, pp. 1138-1160; Win Anderson, "Slim's Testimony In KAYE Probe Cut Short," TNT (30 November 1970): 4; Initial Decision, p. 5.

[44] The tapes included racist statements by Jon Gold, a statement by Rasmussen accusing the president of a local bank of using depositors' funds to pay for political ads, and Nicholls accused the organizers of "Human Relations Day" at Fife High School of "taking unfair advantage of a group of high school kids...the same psychological weapon that was used in North

Korea. It is nothing but treasonous talk." The exhibits also included 40 pages of letters, 110 pages of transcript, 15 pages of legal documents and six issues of New Times, a newspaper published by Gold."Hearing Accepts PSC Exhibits on KAYE," TNT (11 December 1970): A3; Michael J. Sweeney, "KAYE Lawyers Expected To Have a Busy Weekend," TNT, 12 December 1970, p.4.

[45] Initial Decision, p. 21, KAYE, UW.

[46] In re Application of KAYE Broadcasters, 24 RR 2d 772 (27 June 1972).

[47] quoted in, Cole and Ottinger, Reluctant Regulators, p. 211.

[48] Memorandum Opinion and Order, FCC 72M-1478 (4 December 1972); In re Application of KAYE, 44 FCC 2d 308 (20 December 1973).

[49] B.P. Cottone to Carl McIntire, 17 August 1973, B.P. Cottone to Alan N. Rasmussen, 17 June 1974, KAYE, UW, Box 4. Cottone wrote McIntire to say that he could no longer devote time to either KAYE or WXUR unless funds were forthcoming.

[50] Letters, Nicholls to Annis, 13 December 1972; Wulf to Cottone, 18 December 1972. KAYE, UW. Box 10.

[51] Nicholls v. Nash, Opening Brief for the Appellant n.d. (c. 1980); B.P. Cottone to Carl McIntire, 17 August 1973, B.P. Cottone to Alan N. Rasmussen, 17 June 1974, KAYE, UW, Box 4; "Ex-radio Figure Appeals Denial of His FCC Suit," The News Tribune (15 February 1980): A-4; Win Anderson, "KAYE suit is settled as Nicholls bows out," TNT, 5 November 1973, p. 1; In re Application of KAYE Broadcasters, 44 FCC 2d 308 (19 December 1973); 46 FCC 2d (10 April 1974); 30 RR 2d 642 (5 June 1974); ; 31 RR 2d 1044 (9 October 1974); 31 RR 2d 1579 (20 November 1974).

[52] Ex-radio Figure Appeals Denial of His FCC Suit," TNT (15 February 1980): A-4. Nicholls v. Nash, 647 F.2d 171 (9th Cir. 1981).

[53] Barron, supra, n. 1; Donald E. Lively, "Fairness Regulation," Washington and Lee L. Rev. 45 (1988): 1379. also see, Timothy J. Brennan, "The Fairness Doctrine as Public Policy," Journal of Broadcasting 33 (1989): 419.